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(29)

No. 99-830

Feb 29 2000

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF ARTICLE 3, §2 FEDERAL SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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February 28, 2000

115pp

QUESTIONS PRESENTED

Re: Lack of Federal Subject Matter Jurisdiction under the 11TH Amendment, See *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 at 432 and 437, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982), Infra at page 2; and *Nebraska v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999), Infra at Pages 6-9.

I

Whether the Opinion and Judgment of the 8TH Circuit Court of Appeals Abridges the Sovereign Right of the State of Nebraska under the **10TH** and **11TH Amendments to the U.S. Constitution**; as Construed by this Court in ***Watson v. Buck***, 313 U.S. 387 (1941), and the ***Watson v. Buck*** **Abstention Doctrine**, as That Doctrine Has Been Factored into ***Younger v. Harris***, 401 U.S. 37 (1971), and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975), reh. den., 421 U.S. 971, and the ***Younger*** and ***Huffman*** **Abstention Doctrines**; Which Require That New Legislation (Civil and Criminal) Involving an "Important State Interest"; i.e., Public Morals, Which Can Be Given a Constitutional Construction, must Be Initially Construed and Applied by the Nebraska Judiciary; Which, under the **Doctrine of Separation of Powers** Is Required, Where Possible, to Give the State Statute a "Saving Construction", and Thereby Assist the Nebraska State Legislature in its Effort to Write a State Statute Which Will Meet the Constitutional Requirements of the Federal Judiciary with Respect to the Federal Constitution **?**

II

Whether the U.S. District Court for the District of Nebraska Lacked **Article 3, §2** Subject Matter Jurisdiction of Respondent Carhart's Federal Civil Rights Action for Failure of the Trial Court to Make the Jurisdictional Findings of Fact Required by the **11TH Amendment** and ***Watson v. Buck***, 313 U.S. 387 (1941) and the ***Watson v. Buck*** **Abstention Doctrine**, as Factored into the ***Younger - Huffman*** **Abstention Doctrines** by this Court's Opinions in ***Younger v. Harris***, 401 U.S. 37 (1971) and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975), Reh. Den., 421 U.S. 971 (1975); Where the State Legislature Has Enacted Legislation Dealing with the Public Crime of "Infanticide" Which Is Engaged in under the Mantra of a Personal Right to an Abortion; and Where Such Important State Legislation on Public Morals Is Not Unconstitutional on its Face and Can Be Constitutionally Construed by the Nebraska Judicial System; Which, Pursuant to the **Doctrine of Separation of Powers** Is under a Constitutional Duty, Where Possible, to Give Such Legislation a Constitutional Construction ?

TABLE OF CONTENTS

QUESTIONS PRESENTED, ... i

TABLE OF CONTENTS, ... iii

TABLE OF AUTHORITIES, ... vi

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF,
CASES, ... vi
FEDERAL RULES, STATUTES, ... vi

AMICUS CURIAE BRIEF,
CASES, ... vi
FEDERAL RULES, STATUTES, ... x
STATE RULES, STATUTES, ... x
TEXTS, LAW REVIEWS, MISCELLANEOUS, ... xi

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) IN SUPPORT OF NEITHER PARTY, SUGGESTING A SUMMARY REVERSAL OF THE JUDGMENT FOR THE RESPONDENT CARHART UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 83 (1998) FOR LACK OF FEDERAL SUBJECT MATTER JURISDICTION DUE TO FAILURE OF THE TRIAL COURT TO MAKE THE JURISDICTIONAL FINDINGS OF FACT REQUIRED BY *YOUNGER V. HARRIS*, 401 U.S. 37 (1971), AND *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975)., ... 1

THE IMPORTANCE OF *SUMMIT MEDICAL ASSOCIATES, P.C., ET AL. V. FOB JAMES, JR., ET AL.*, 984 F.SUPP. 1404 AT 1420 (JAN. 26, 1998) IN RELATION TO *BILL PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041., ... 3

CERTIORARI SHOULD BE GRANTED IN *BILL PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041 AND SET FOR ORAL ARGUMENT IN TANDEM WITH *STENBERG V. CARHART*., ... 4

BRIEF OF AMICUS CURIAE JAMES J. CLANCY IN SUPPORT OF NEITHER PARTY., ... 1

INTRODUCTION, ... 1

THE "GIST" OF THIS AMICUS CURIAE BRIEF., ... 2

THE IMPORTANCE OF *STENBERG V. CARHART*, NO. 99-830., 6

CONTENTIONS OF AMICUS CURIAE JAMES J. CLANCY., .. 9

I INTEREST OF AMICUS CURIAE: BACKGROUND., ... 10

II INTEREST OF THE AMICUS CURIAE: A RE-EXAMINATION OF *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975) IS CONTRAINDICATED., ... 12

II(A) The Critical Status of the Ohio State Court's Jurisdiction and Huffman's Dilemma., ... 13

II(B) Abdication of this Court's Primary Duty re Jurisdiction in *Huffman*– Ohio's Concern re Moral Depravity, an Important State Interest under the 10TH and 11TH Amendments., ... 14

II(C) The Prosecuting Attorney's Interests Versus This Court's Interests in *Huffman*., ... 16

II(D) The Battle was Won, but the "War" was Lost. This Court Can, and must Correct That Defect., ... 18

III INTEREST OF THE AMICUS CURIAE: STATEMENT OF THE CASE OF CLIENT CLARENCE F. MURPHY, IN THE U.S. SUPREME COURT IN CASE NO. 98-1442., ... 18

III(A) Adequate Relief Cannot Be Obtained by Murphy in Any Other Forum or from Any Other Court for the Following Reasons:, ... 23

III(B) The Refusal of a Majority of Federal Courts to Acknowledge the "Jurisdictional" Aspect of the *Huffman* Abstention Doctrine in Such a Situation, Where Each Party Claiming Jurisdiction in a Different Entity, Manifests a Need for Re-Examination of the *Huffman* Cases., ... 23

CONCLUSION., ... 24

The Refusal of The Federal Courts of Appeal to Recognize And Treat The Right of The State Judiciary to Interpret New Legislation Under *Watson v. Buck* Abstention as an 11TH Amendment Right Involving Important State Interests And State Public Policy Has Had a Devastating Effect on Law Enforcement in The Public Morals Area And Needs to Be Corrected (See Appendix D to This Amicus) And in a Forceful Manner by Vacating the Judgments and Sending All of The Partial Birth Abortion Cases Which Are on Its Docket Back to The State Courts For Their Initial Interpretation And Construction., ... 24

TABLE OF AUTHORITIES

Motion for Leave to File Amicus Curiae Brief

CASES (MOTION)

Huffman v. Pursue Ltd., No. 73-296
(***Huffman*** **Abstention Doctrine,**)
420 U.S. 592, 611-613,43 L.Ed.2d 482,
95 S.Ct. 1200 (1975); reh. den., 421 U.S. 971,
44 L.Ed.2d 463, 95 S.Ct. 1969, ... **1-2, 4-5**

(Bill) Pryor .v Summit Medical Associates,
No. 99-1041, October Term 1999, ... **3-5**

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003,
at **Point III** (March 4, 1998), ... **1-2, 5**

Summit Medical Associates, P.C., et al. v. Fob James, Jr., et al., 984 F.Supp. 1404 at 1420 (Jan. 26, 1998), . . **3-4**

Watson v. Buck, (***Watson v. Buck*** **Abstention)**
313 U.S. 387, 61 S.Ct. 962 (1941), ... **2, 4**

Younger v. Harris (***Younger*** **Abstention Doctrine),**
401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), ... **1-5**

FEDERAL RULES, STATUTES, (MOTION)

United States Constitution, ... **1, 5**
Article 3, §2, ... **2, 5**
11TH Amendment, ... **2-5**

United State Supreme Court Rule 37.3(b), ... **1**

AMICUS CURIAE BRIEF

CASES (AMICUS)

Allen v. McCurry, 449 U.S. 90 at 100,
104, 60 L.Ed.2d 308, 101 S.Ct. 441 (1980), ... **21**

Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 281,
26 L.Ed.2d 234, 90 S.Ct. 1739 (1970) (***Younger*** at 40), . . **9**

Brockett v. Spokane Arcades, Inc.,
(***Brockett 1981***) 454 U.S. 1022 at 1022-1023,
70 L.Ed.2d 468, 102 S.Ct. 557 (1981) **18, 25-26, 29**

Brockett v. Spokane Arcades, Inc., **(Appendix F)**
(***Brockett 1985***) 472 U.S. 491 at 506, hn.6,
86 L.Ed.2d 394, 408-410, 105 S.Ct. 2794 (1985) . **18, 28-29**

(California ex rel.) Cooper v. Mitchell Brothers' Santa Ana Theater, etc., et al., 454 U.S. 90,
70 L.Ed.2d 262, 102 S.Ct. 172 (1981) **14, 24-26**

Dist. of Columbia Court of Appeals v. Feldman,
460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983)
(see ***Rooker-Feldman*** **Abstention**), ... **3, 23**

Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22,
85 S.Ct. 1116 (1965) (***Younger*** at 48), ... **9, 30**

Ex Parte Young, 209 U.S. 123, 52 L.Ed. 714,
28 S.Ct. 441 (1908) (***Younger*** at 45), ... **3-4, 9**

Fenner v. Boykin, 271 U.S. 240, 70 L.Ed.2d 927,
46 S.Ct. 492 (1926) (***Younger*** at 45-46), ... **9**

Hicks v. Miranda,
422 U.S. 322, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975), **10, 15**

Hope Clinic v. Ryan, No. 99-1152, Oct. Term 1999,
Petition for Certiorari filed Jan. 10, 2000, ... **29**

Hope Clinic v. Ryan, No. 99-1156, Oct. Term 1999,
Petition for Certiorari filed Jan. 10, 2000, ... **29**

Hope Clinic v. Ryan, No. 99-1177, Oct. Term 1999,
Petition for Certiorari filed Jan. 14, 2000, ... **29**

Huffman v. Pursue Ltd., No. 73-296
(***Huffman*** **Abstention Doctrine,**)
420 U.S. 592, 606 fn.18&19, 611-613,
43 L.Ed.2d 482, 493-494 fn.18&19, 95 S.Ct. 1200 (1975);
reh. den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969,
. . . . . **2-5, 11-14, 16-20, 22-24, 30**

Huffman v. U.S. District Court,
No. 73-1613 Misc., ... **12-13, 16**

In Re Clarence Murphy, U.S.S.C.T. No. 98-1442,
Petition for Writ of Mandamus, ... **11, 13, 18**

Kerr v. U.S. District Court,
426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119 (1976), . . . **22**

Middlesex Ethics Comm. v. Garden State Bar Assn.,
457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982) . . . **2**

Migra v. Warren City School Dist. Bd. of Ed.,
465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) **2**

Montgomery v. Bremer County Board of Supervisors,
299 N.W.2d 687 at 692 (Iowa Supreme Court 1980), . . . **19**

Nebraska v. Divis, 589 N.W.2d 537,
256 Neb. 328, 330-332, 334-335 (1999), ... **6-9, 29**

Nemmers v. City of Dubuque, Iowa,
716 F.2d 1194 (1983), ... **19**

Parratt v. Taylor, 451 U.S. 527,
68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) **21**

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 at 14-17, fn.9,
95 L.Ed.2d 1, 107 S.Ct. 1519 (1987), ... **3**

Plough v. West Des Moines Community School District,
70 F.3d 512, 516-517 (CA 8TH 1995), ... **2-3, 20**

(Bill) Pryor .v Summit Medical Associates,
No. 99-1041, October Term 1999, ... **2-3, 9, 11, 29-30**

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139,
121 L.Ed.2d 605 at 610, 113 S.Ct. 684 (1993), ... **22**

Roe v. Wade, 410 U.S. 113,
35 L.Ed.2d 147,93 S.Ct. 705 (1973) **1**

Rooker-Feldman **Abstention Doctrine**
(see ***Rooker*** and ***District of Columbia Court, etc.***), . . . **3, 23**

Rooker v. Fidelity Trust Co., 263 U.S. 413, (1923)
(see ***Rooker-Feldman*** **Abstention**) **3, 23**

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83,.140 L.Ed.2d 210, 118 S.Ct. 1003,
at **Point III** (March 4, 1998), ... **14, 22**

Summit Medical Associates, P.C., et al. v. Fob James, Jr., et al., 984 F.Supp. 1404, 1419-1420, 1432-1433,
(Jan. 26, 1998) **3, 4**

Summit Medical Associates, P.C., et al. v. Pryor, et al., No. 98-6129 (11TH Cir. July 15, 1999),
68 U.S.L.W. at 1079 (publ. Aug. 10, 1999), ... **10**

University of Tennessee v. Elliott,
478 U.S. 788, at 799, 92 L.Ed.2d 635,
106 S.Ct. 3220 (1986), ... **2**

Watson v. Buck, (***Watson v. Buck*** **Abstention**)
313 U.S. 387, 61 S.Ct. 962 (1941)
(***Younger*** at 46, 49, 53), ... **9, 24-25, 30**

Will v. U.S.,
389 U.S. 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967), ... **22**

Wisconsin Dept. of Corrections v. Schacht, No. 97-461,
524 U.S. ___, 141 L.Ed.2d 364 at 375-378,
118 S.Ct. ___,(June 22, 1998), ... **22**

World Famous Drinking Emporium, Inc. v. City of Tempe, Arizona, **(Appendix G)**
820 F.2d 1079 (9TH Cir. 1987), ... **29**

Younger v. Harris **(*Younger* Abstention Doctrine),**
401 U.S. 37, 45-46, 49, 27 L.Ed.2d 669,
91 S.Ct. 746 (1971), ... **2-5, 9-12, 16-17, 30**

FEDERAL RULES, STATUTES, (AMICUS)

Judicial Doctrines
Res Judicata, ... **3, 19-23**
Separation of Powers, ... **30**
Stare Decisis, ... **3, 22-23**

Rule ***Nisi***, ... **16, 22**

United States Codes
28 U.S.C. §1651(a), ... **12, 21-22**
28 U.S.C. §2281 (repealed in 1976), ... **12**
42 U.S.C. §1983, ... **12, 20-22**
42 U.S.C. §1988, ... **20, 22, 30**

United States Constitution,
Article 3, §2, ... **2, 12, 22-24, 29**
1ST Amendment, ... **9**
10TH Amendment, ... **9, 12, 14-15, 18**
11TH Amendment, . . **2-4, 9-12, 14-15, 17-25, 29, 30**
14TH Amendment, (Due Process Clause), ... **12**

STATE RULES, STATUTES (AMICUS)

Bettendorf Zoning Code
§24.2, ... **19**
§24.4 (**20% Rule** [procedural] **"Protest"**), . . . **19-20**

Iowa Constitution,
Article 1, §9 and §18 ("**Vested Rights**" claim), . . **19**

Ohio Revised Codes, Chapter 3767 (re ***Huffman***), ... **15**

TEXTS, LAW REVIEWS, MISCELLANEOUS (AMICUS)

Criminal Law, ***Rollin M. Perkins***,
Foundation Law Press, 3RD Ed. (First published in 1955)
at, pages 465-466,, ... **15**

Supreme Court Practice, *7TH Ed.*, ***Stern, Gressman, Shapiro and Geller*, ©1993,** at page 495, ... **22**

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) IN SUPPORT OF NEITHER PARTY, SUGGESTING A SUMMARY REVERSAL OF THE JUDGMENT FOR THE RESPONDENT CARHART UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 83 (1998) FOR LACK OF FEDERAL SUBJECT MATTER JURISDICTION DUE TO THE FAILURE OF THE TRIAL COURT TO MAKE THE JURISDICTIONAL FINDINGS OF FACT REQUIRED BY *YOUNGER V. HARRIS*, 401 U.S. 37 (1971), AND *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975).

NOW COMES James J. Clancy, Attorney at Law, and a member of the Supreme Court Bar, to move this Court pursuant to **Rule 37.3(b)** [1/] for leave to file a Brief Amicus Curiae, in support of neither of the Parties, suggesting a summary reversal of the Judgment for Respondent Carhart under ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83 (March 4, 1998) for lack of federal subject matter jurisdiction due to the failure of the Trial Court to make the Jurisdictional Findings of Fact required by ***Younger v. Harris***, supra, and ***Huffman v. Pursue, Ltd.***, supra.

The ***Steel Co.*** case is cited for the Proposition of Law which holds that the first duty of every Court is to make a determination whether, under the **U.S. Constitution**, the court has jurisdiction over the subject matter of the action which is before it. It matter not that Attorney General Stenberg did not raise the issue of lack of subject matter jurisdiction in ***Stenberg v. Carhart***, at the trial, or on appeal, or in his Petition to this

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[1/] Consent of all parties was requested and has been denied. See correspondence at **Appendix H** to this Brief Amicus Curiae. No counsel for a party authorized this Brief in whole or in part, and no person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation or submission of this Brief.

Court. It is sufficient that Amicus has, by this Motion, brought the matter to this Court's attention before the Oral Argument in this Court in ***Stenberg v. Carhart***, and has framed the issues in two specific Jurisdictional Questions at **pages i** and **ii** to this Brief. Amicus contends that ***Steel Co.***, supra, requires this Court to consider both Jurisdictional Questions, ***sua sponte***, because of the seriousness of the **11TH Amendment** Constitutional infringement involving ***Watson v. Buck***, 313 U.S. 387 (1941).

The judgment of the U.S. District Court and that of the 8TH Circuit Court of Appeals must be vacated upon the grounds of lack of **Article 3, §2** federal subject matter jurisdiction, pursuant to the **11TH Amendment**; ***Watson v. Buck***, 313 U.S. 387 (1941); ***Younger v. Harris***, 401 U.S. 37 (1971); ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975); and the ***Younger*** - ***Huffman*** **Abstention Doctrines** for failure of the Trial Court to make the specific jurisdictional findings of fact required by ***Younger*** and ***Huffman***, see, in particular, ***Huffman***, 420 U.S. at 611-613 (last three [3] paragraphs of Chief Justice Rehnquist's opinion) reading:

> " Younger, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is ' "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." ' As we have noted, the District Court in this case did not rule on the Younger issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. Even if the District Court's opinion can be interpreted as a sub silentio determination that the case fits within the exception for statutes which are ' "flagrantly and patently violative of express

> constitutional prohibitions," ' such a characterization of the statute is not possible after the subsequent decision of the Supreme Court of Ohio in State, ex rel. Ewing v A Motion Picture Film Entitled 'Without a Stitch,' 37 OhioSt.2d 95, 307 NE2d 911 (1974). That case narrowly construed the Ohio nuisance statute, with a view to avoiding the constitutional difficulties which concerned the District Court." (Our emphasis.)
>
> " We therefore think that this case is appropriate for remand so that the District Court may consider whether irreparable injury can be shown in light of 'Without a Stitch', and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. The judgment of the District Court is vacated and the cause is remanded for further proceedings consistent with this opinion." (Our emphasis.)
>
> " It is so ordered."

THE IMPORTANCE OF *SUMMIT MEDICAL ASSOCIATES, P.C., ET AL. V. FOB JAMES, JR., ET AL.*, 984 F.SUPP. 1404 AT 1420 (JAN. 26, 1998) IN RELATION TO *BILL PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041.

As noted by the Trial Court below in ***Summit Medical Associates, P.C., et al. v. Fob James, Jr., et al.***, supra, the **11TH Amendment** issue presents a case of first impression in the partial birth abortion area. Governor Fob James, Jr. and Attorney General Bill Pryor pleaded the **11TH Amendment** and the ***Younger*** **Abstention Doctrine** as a jurisdictional bar which precluded the Federal Court from asserting subject matter jurisdiction over the Plaintiff's Complaint as filed. The Motion of Amicus Curiae James J. Clancy, timely filed in ***Pryor***, supra,

on February 2, 2000, was made necessary because the issue of subject matter jurisdiction under the **11TH Amendment**, which was the paramount issue raised in the Court below and in the Court of Appeals, is not discussed in the Attorney General's Petition for Writ of Certiorari.

For the past 26 years, Amicus has been waiting for the day when a case such as ***Pryor v. Summit Medical Associates***, No. 99-1041, would reach this Court's Docket and force the issue as to whether the ***Younger v. Harris***, 401 U.S. 37 (1971) and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975) and ***Watson v. Buck***, 313 U.S. 387 (1941) **Abstention Doctrines** are jurisdictional when an **11TH Amendment** challenge is raised by a state as a jurisdictional bar in the Federal Court and before trial.

CERTIORARI SHOULD BE GRANTED IN *BILL PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041 AND SET FOR ORAL ARGUMENT IN TANDEM WITH *STENBERG V. CARHART*.

Governor Fob James' Motion to Dismiss the Civil Rights complaint in ***Summit Medical Associates v. Fob James, Jr.***, supra, for lack of subject matter jurisdiction pursuant to the **11TH Amendment** has framed the **11TH Amendment** issue. The issue of Governor James' jurisdictional defense having been raised in Amicus James J. Clancy's Brief in ***Bill Pryor v. Summit Medical Associates***, No. 99-1041, this Court must now decide that jurisdictional issue in ***Pryor***, supra, at the outset, ***sua sponte***, in relation to the impact that the "bar" in ***Pryor***, supra, will have on ***Stenberg v. Carhart*** and on all of the Partial Birth Abortion cases on this Court's Docket this Term, and should, therefore, grant its writ of certiorari in ***Bill Pryor v. Summit Medical Associates*** now and set it for oral argument in tandem with ***Stenberg v. Carhart***.

Under Amicus' analysis of "subject matter jurisdiction", the definitive question in ***Bill Pryor v. Summit Medical Association***, No. 99-1041, under the **U.S. Constitution** and ***Steel Co.***, supra, is: "Is it a case of **11TH Amendment** (constitutional) subject matter jurisdiction for the state court to decide, or is it **Article 3,§2** (statutory) federal subject matter jurisdiction for the U.S. District Court to decide. The issue of "lack of subject matter jurisdiction" which is before the Federal Court in Governor Fob James, Jr.'s case, pursuant to the ***Younger - Huffman*** **Abstention Doctrines**, is adversarial, and is jurisdictional– jurisdiction is in either the State Court or it is in the Federal Court– it cannot be in both!

Nor has the **11TH Amendment** jurisdictional bar been "waived" where the facts demonstrate that the issue could and should have been raised by Arkansas and Nebraska. The failure to raise the issue, very definitely, was not a conscious waiver on the part of the State of Arkansas or Nebraska.

A decision in ***Bill Pryor v. Summit Medical Associates***, supra, that Governor James was correct and that his motion must be granted to allow the Alabama State Judiciary to perform its constitutional duties with respect to new legislation on behalf of the Sovereign State of Alabama will require that all of the other Partial Birth Abortion cases which will reach this Court's Docket, must be vacated in order that each of the States of Alabama, Nebraska, Illinois, Wisconsin, and the other States might have their State Courts render an initial State Court construction pursuant to ***Steel Co.***, supra, and the **11TH Amendment**.

Dated: **February 28, 2000**

Respectfully submitted,

James J. Clancy
Counsel of Record.

BRIEF OF AMICUS CURIAE JAMES J. CLANCY IN SUPPORT OF NEITHER PARTY.

INTRODUCTION

In 1998, the underlying rationale of ***Roe v. Wade***, 410 U.S. 113 (1973) was seriously eroded by two scientific events which took place in the form of: **(1)** a mishap which, only recently, has come to light; and **(2)** benefits in the form of an operation to cure the genetic disease of Spina Bifida which were bestowed upon an unborn "child-person" of 24 weeks while "partially" out of the womb.

In 1998, a scientific "mishap" occurred which recently, has been brought to the public's attention. As a result of this mishap, it has been revealed and established by irrefutable "living" proof that "an entire person" with a separate and distinct D.N.A. identification is "created" at the fertilization of the female embryos by the male sperm, and before the implantation in the womb of the female (see the analysis of Thomas F. Fee and other news articles of such "mishap" at **Appendix A** and **Appendix B** to this Amicus Brief).

One of the results of the second scientific event is to raise a question whether due process and equal protection of the law are being accorded unborn "child-persons", while in the womb of the female, and whether the female should be held responsible for its "care" while in the womb. See, in this regard, and compare the unequal protection of the laws of a community which confers a benefit upon a 24 week old unborn "child-person" in the form of an operation and cure, at the instance of an exceptionally qualified physician-surgeon for the genetic disease of Spina Bifida, while "partially" out of the womb, while at the same time tolerating the death and destruction by dismemberment of the body of a healthy unborn "child-person", also age 24 weeks by Abortionist Leroy Carhart while performing a "partial" birth abortion, as described by the U.S. District Court at **Appendix A-1** to this Amicus Brief. See the

news reports at **Appendix B** to this Amicus Brief and compare the same with the news account at **Appendix A**.

If one unborn, healthy "child-person" at age 24 weeks can be destroyed by being dismembered by Abortionist Carhart while "partially" out of the womb, for the mere convenience of the woman, while another unborn "child-person" at age 24 weeks with a birth defect is being saved (cured) through an extraordinary operation by an experienced surgeon at the expense of the community, can these two events be reconciled with the"due process", and "equal protection of the laws" concepts, and the oath of our forefathers when they signed the Declaration of Independence and swore to uphold the Laws of Nature and Nature's God ?

THE "GIST" OF THIS AMICUS CURIAE BRIEF.

Amicus Curiae respectfully submits that the ***Huffman*** **Abstention Doctrine** as it is presently being administered is wrong-headed. It was formulated as a jurisdictional rule to separate **Article 3, §2** jurisdiction (based upon the fiction that the state actor is a "rogue") from **11TH Amendment** jurisdiction, and should have been applied, as such, by the U.S. District Court. However, during the past 27 years this Court has never come together and admitted that background fact in any of the many opinions on the ***Younger*** - ***Huffman*** **Abstention** cases.

This Court can and should correct that defect in ***Bill Pryor v. Summit Medical Associates***, supra, by granting certiorari in that cases and ordering U.S. District Judge Myron H. Thompson to vacate his judgment in the trial court for lack of subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and its progeny: ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423 (1982), ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75 (1984), ***University of Tennessee v. Elliott***, 478 U.S. 788 at 799 (1986), and ***Plough v. West Des Moines***

Community School District, 70 F.3d 512 at 516-517 (CA 8TH 1995); and under the ***Rooker-Feldman*** **Abstention Doctrine**, the **Res Judicata Doctrine** and the **Stare Decisis Doctrine** of this Court as set forth in the Amicus Curiae Brief of James J. Clancy, filed February 2, 2000, in ***Bill Pryor v. Summit Medical Associates***, No. 99-1041, and herein on February 28, 2000, in ***Stenberg v. Carhart***.

In his opinion, U.S. District Judge Myron H. Thompson erroneously assumed that the ***Younger*** **Abstention Doctrine** was not applicable because a case involving the Statute was not pending in the State Court. See ***Summit Medical Associates***, 984 F.Supp. 1404 at 1432-1433. Amicus contends that Judge Thompson's assumption is fatal to his judgment for the Plaintiffs. The **11TH Amendment**, which is the foundation for and "factored" into ***Younger - Huffman*** **Abstention**, is a broader and more fundamental doctrine. See ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1 at 14-17 (1987) at fn. 9 on page 16:

> "9. In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficiently to justify abstention, even if there are no pending state proceedings in which the question could be raised. See ***Railroad Comm'n of Texas v. Pullman Co.***, 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643 (1941)." (My emphasis.)

Bill Pryor v. Summit Medical Associates, supra, is "such a case". The Legislation therein involves an "as applied" constitutional claim. The Trial Court's "referral of questions" to the Alabama Supreme Court and that Court's refusal to reply makes the Federal Court's Opinion merely "advisory" and satisfies the requirement of ***Pennzoil Co. v. Texaco, Inc.***, supra, and the **11TH Amendment**.

In the trial of the Alabama Partial Birth Abortion case, ***Summit Medical Associates, et al.*** cannot reinterpret ***Ex Parte***

Young, supra, or use it to overrule ***Younger***, supra, because ***Ex Parte Young*** was "factored" into Justice Hugo Black's majority opinion in ***Younger***. The Federal District Court is bound by ***Younger*** and ***Huffman***, supra, and is required to make the special jurisdictional findings which ***Younger*** requires. See ***Huffman***, 420 U.S. at 611-613 and **page 3** of the Motion for Leave to file an Amicus Curiae Brief. That jurisdictional burden was on the Federal Plaintiff who had to plead and prove his right to be in the Federal Court. None of the Plaintiffs in any of the Partial Birth Abortion cases on file in this Court has satisfied its burden.

The ***Younger*** **Abstention Doctrine** is controlling even where there is no state case pending at the time of filing the federal action where, as here, the State Court has not had an opportunity to interpret the State Statute, and such an interpretation can "save" the Statute– the so-called ***Watson v. Buck***, supra, exception which is referred to and "factored into" Justice Black's opinion in ***Younger v. Harris***, 401 U.S. 37 at 45-46 and 49.

In his analysis, Judge Thompson did not consider the ***Younger - Huffman*** **Abstention Doctrines** as an integral part of the **11TH Amendment** challenge. See ***Summit Medical Associates***, supra, 984 F.Supp at 1419:

> "IV. ATTORNEY GENERAL DEFENDANTS' JURISDICTIONAL CHALLENGES
>
> " . . . .
>
> " For the sake of clarity, and to ensure that it fully and properly resolves each of the attorney general defendants' challenges, the court will address them separately and systematically. First, it will determine whether, as the attorney general defendants contend, all of the plaintiffs' claims are barred by the eleventh amendment, so that the entire lawsuit must be dismissed.

> Next, the court will ascertain whether the suit as a whole, or any subset of the plaintiffs' claims, must be dismissed for lack of an Article III case or controversy. To resolve this issue, the court will address whether the plaintiffs enjoy standing to bring their various claims, as well as whether any of these claims has been rendered moot, and hence non-justiciable, in light of the defendants' post-filing actions. Finally, the court will determine whether any of the abstention doctrines, grounded on considerations of comity between the state and federal judicial systems, and on principles that govern federal [**19] courts sitting in equity, counsels dismissal of any of the plaintiffs' claims, or a stay pending resolution by the Alabama Supreme Court of any issues raised by these claims. . . . . " (My emphasis.)

The U.S. District Judge's analysis of the Alabama Attorney General's Jurisdictional challenges which appears thereafter at pages 1420-1439 reads:

> "A. **11TH Amendment**, 984 F.Supp. 1404 at 1420-1425.
> "B. **Article III** Case or Controversy requirements, 1425-1432.
> 1. Standing, 1425-1430.
> 2. Mootness, 1430-1432.
> "C. **Abstention Doctrines**, 1432-1439.
> 1. ***Younger*** **Abstention**, 1432-1434.
> 2. **Equity Principles**, 1434-1436.
> 3. **Pullman Abstention**, 1436-1439."

As can be seen from the above outline, the ***Younger*** **Abstention Doctrine**, which should be analyzed at "Point A" on page 1420 (at the very beginning) because it and the ***Huffman*** **Abstention Doctrine** are squarely on point and controlling, appears, as an afterthought, as one of the General Abstention Doctrines to be considered as a mere matter of Equity.

THE IMPORTANCE OF *STENBERG V. CARHART*, NO. 99-830.

As to ***Stenberg v. Carhart***, the review exercised by the 8TH Circuit Court of Appeals below must be regarded as being merely "advisory", as a matter of law. It very clearly does not meet the "Standard of Review" which the Nebraska Judiciary has established as a part of the Public Policy of the Sovereign State of Nebraska. See ***Nebraska v. Divis***, 256 Neb. 328, 589 N.W.2d 537 (1999), "Standard of Review", reading at 256 Neb., page 330:

> Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court. State v. Torres, 254 Neb. 91, 574 N.W.2d 153 (1998); State v. Roucka, 253 Neb. 885, 573 N.W.2d 417 (1998). The party challenging the constitutionality of a statute bears the burden to ' "clearly establish[ ]' " the unconstitutionality of a statutory provision. State v. Schmailzl, 243 Neb. 734, 736, 502 N.W.2d 463, 465 (1993), quoting Weiner v. State ex rel. Real Estate Comm., 217 Neb. 372, 348 N.W.2d 879 (1984). Statutes are presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality. State v. Philipps, 246 Neb. 610, 521 N.W.2d 913 (1994). A penal statute must be construed so as to meet constitutional requirements, if such a construction can be reasonably accomplished. State v. Bainbridge, 249 Neb. 260, 543 N.W.2d 154 (1996)." (Our emphasis.)

and at page 331:

> " For a claim of unconstitutionality based on the face of a statute to succeed, the party challenging the statute must show that the law impinges on some fundamental constitutional right or that the law creates a suspect classification. Robotham v. State, 241 Neb. 379, 488 N.W.2d 533 (1992).
>
> > 'If the . . . Law implicates neither fundamental rights nor suspect classifications, it must be upheld unless it bears no rational relationship to a legitimate government interest.'
>
> "Id. at 383, 488 N.W.2d at 538. See, also, United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that facial challenge to legislative act is most difficult challenge to mount successfully, because challenger must establish that no set of circumstances exists under which act would be valid)." (Our emphasis.)

and at page 332:

> " The separation of powers clause is contained in Neb. Const. Art. II, §1. It provides:
>
> > 'The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.'
>
> " We have observed that the separation of powers clause
>
> > 'prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution itself otherwise directs or permits.'

"State v. Philipps, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). See Otey v. State, 240 Neb. 813, 485 N.W.2d 153 (1992)." (Our emphasis.)

and at page 334:

" Similarly, the Legislature has the authority to fix the penalty range with can be imposed for the crimes it has defined. The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review. In this regard, in State v. Tucker, 183 Neb. 577, 579, 162 N.W.2d 774, 776 (1968), quoting State ex rel. Nelson v. Smith, 114 Neb. 653, 209 N.W. 328 (1926), we observed:

' "The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts." '

"See State v. Tatreau, 176 Neb. 381, 126 N.W.2d 157 (1964)."

and at page 335:

" It is the role of the court, to the extent possible, to give effect to the entire language of the statue, and to reconcile different provisions of the statute, 'so they are consistent, harmonious, and sensible.' Van Patten v. City of Omaha, 167 Neb. 741, 751, 94 N.W.2d 664, 670 (1959). When considering a statute's meaning, it is appropriate for the court to consider

'the evil and mischief attempted to be remedies, the objects sought to be accomplished, the scope of the remedy [to which] its terms apply, and

[to] give [the statute] such an interpretation as appears best calculated to effectuate the design of the . . . legislative provisions'

"E.K. Buck Retail Stores v. Harkert, 157 Neb. 867, 872-73, 62 N.W.2d 288, 294 (1954)." (Our emphasis.)

CONTENTIONS OF AMICUS CURIAE JAMES J. CLANCY.

Younger v. Harris, supra (1971), was a 5-4 decision. The majority opinion, which was written by Justice Hugo Black, clearly rejected the type of interference which was employed by the Federal Court in this case. Although Justice Black was an absolutist on the **1ST Amendment**, he was a stronger supporter of "State's Rights" under the **11TH Amendment**, which is reflected in his ***Younger*** opinion, which involved a prosecution involving free speech. His "***Younger***" opinion (the ***Younger*** **Abstention Doctrine**) "reconciled" the principles expressed in 5 cases: ***Ex Parte Young***, 209 U.S. 123 (1908): ***Younger*** at 45; ***Dombrowski v. Pfister***, 380 U.S. 479 (1965): ***Younger*** at 48; ***Watson v. Buck***, 313 U.S. 387 (1941): ***Younger*** at 46, 49, 53; ***Fenner v. Boykin***, 271 U.S. 240 (1926): ***Younger*** at 45-46; ***Atlantic Coast Line R. Co. v. Engineers***, 398 U.S. 281 (1970): ***Younger*** at 40. The ***Younger*** **Abstention Doctrine** is firmly grounded upon the Sovereign right of each state under the **10TH and 11TH Amendment** to have its important state interests (both criminal and civil) tried and decided by the State Judiciary, which has the absolute right to "interpret" the statute and "assist" the State Legislature in its effort to write constitutional legislation, where possible, see ***Watson v. Buck***, supra. See, in this regard, the public policy expressed by the Nebraska Supreme Court in ***Nebraska v. Divis***, supra, at **pages 6-9** of this Amicus Brief.

Summit Medical Associates' race to the courtroom in No. 99-1041 was fatal to its cause. By filing its Complaint in July, two weeks before the Statutes became effective (on

August 1ST and 12TH, 1997), it is unable to establish that the U.S. District Court had federal subject matter jurisdiction at the time the Complaint was filed because the statutes did not exist in July and were not effective. See, also, ***Hicks v. Miranda***, 422 U.S. 332 (1975) which would have been available to the Alabama Attorney General had he elected to use it (i.e., by filing a declaratory judgment action in the State Court alleging all of the issues raised by Summit and moving to dismiss the Federal action on the grounds that he was not acting as a "rogue"; and, under the **11TH Amendment**, the first interpretive decision of the Statute must be by the Alabama Supreme Court after the first trial under the Statute except where the ***Younger*** special findings of fact exist).

I INTEREST OF AMICUS CURIAE: BACKGROUND.

Amicus learned of the Alabama Attorney General's **11TH Amendment** challenge to Federal jurisdiction and the 11TH Circuit's Opinion in ***Summit Medical Associates, P.C.; et al. v. Pryor, et al.*** No. 98-6129 (July 15, 1999) from a subscription copy of **68 U.S.L.W.** at **1079**, dated August 10, 1999 and requested his computer operator to obtain a copy from the Internet.

On August 18, 1999, Amicus received a copy of the opinion from the (BNA) Internet and made four phone calls to the Attorney General's Office in Montgomery, Alabama (334-242-7300). Upon inquiry, he was informed that Bert Jordan in Birmingham was one of the attorneys for Attorney General Pryor on appeal.

On September 2, 3, 10, 11 and 14, 1999, Amicus phoned Bert Jordan (205-870-0555). On September 14TH Amicus had a lengthy (44 minute) phone conversation with Jordan in which the importance of the Alabama Attorney General's **11TH Amendment** challenge as a case of first impression was discussed at great length. Jordan informed Amicus that he was

one of the attorneys on the case, and that a petition for rehearing en banc would be filed.

On October 18, 1999, Amicus had a second lengthy (43 minute) phone conversation with Jordan and was informed that a petition for rehearing would be filed on or about November 10, 1999 and that the matter of filing a petition for certiorari was being discussed, but it was not known who would prepare the petition.

During the above two lengthy phone conversations with Jordan, Amicus expressed his interest in the Alabama Attorney General's Petition for Certiorari and his convictions: **(1)** that the ***Summit*** case should be reversed upon the authority of ***Younger v. Harris***, supra, and ***Huffman v. Pursue, Ltd.***, supra, because they were squarely in point on the **11TH Amendment** issue and were controlling; and **(2)** that Amicus had been attempting to raise that issue in the U.S. Supreme Court since 1975 (25 years); and was presently trying to do so in a case known as ***In Re Clarence Murphy***, No. 98-1442, etc.; and also explained most of the contentions of Amicus regarding his reason why the ***Younger*** and ***Huffman*** **Abstention Doctrines** were controlling.

On Saturday, January 15, 2000, Amicus learned from an ***L.A. Times*** news article that this Court had granted a Writ of Certiorari in ***Stenberg v. Carhart***, No. 99-830. On Monday, January 24, 2000, Amicus was informed by the Alabama Attorney General in Montgomery (334-242-7445 [Michael Jackson]) that Attorney Jay Sekulow in Washington, D.C. was preparing the Petition for the Alabama Attorney General. On January 27, 2000, Amicus received a fax copy of the Petition from Attorney Sekulow and learned for the first time that neither the **11TH Amendment** issue nor the ***Younger*** **Abstention Doctrine** issue was raised in the Petition for Writ of Certiorari even though the **11TH Amendment** issue was the principal issue urged by the Attorney General in the Trial Court. On January 28, 2000, Amicus faxed a request for consent to

filing an Amicus Curiae Brief for the benefit of the Court on the **11TH Amendment** and the ***Younger*** - ***Huffman*** **Abstention** issues so that those issues could be argued.

On February 1, 2000, Simon Heller refused to consent in writing as attorney for ***Summit Medical Associates***. Walter Weber has not yet responded in writing for Petitioner ***Bill Pryor***. On February 2, 2000, the Clerk of this Court timely filed the Amicus Curiae Brief of James J. Clancy in Case No. 99-1041, which addressed the Subject Matter Jurisdiction Issue which was inadvertently omitted from the Alabama Attorney General's Petition.

II INTEREST OF THE AMICUS CURIAE: A RE-EXAMINATION OF *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975) IS CONTRAINDICATED.

27 years ago (May 1973), the substantial federal question which controls this case; namely, the conflict that necessarily occurs between the subject matter jurisdiction of federal courts under the **14TH Amendment (42 U.S.C. §1983)** and **Article 3, §2** of the **U.S. Constitution**; and the subject matter jurisdiction of state courts under the **10TH and 11TH Amendments** to the **U.S. Constitution**, was squarely before this Court in two forms: **(1)** in ***Lawrence S. Huffman v. U.S. District Court for the Northern District of Ohio, Western Division***, No. 72-1613 Misc., being a Motion for Leave to file a Petition for Writ of Mandamus and Petition for a Writ of Mandamus as to this Court's original jurisdiction pursuant to **28 U.S.C. 1651(a)**; and **(2)** in ***Lawrence S. Huffman v. Pursue, Ltd.***, No. 73-296, which is now reported as 420 U.S. 592, supra, being an appeal from an adverse judgment of a three judge court with respect to the constitutionality of the Ohio Public Nuisance Statute as applied in the Lima, Ohio Public Nuisance Abatement action as then required by this Court's mandatory appellate jurisdiction under **28 U.S.C. §2281** (repealed in 1976).

Amicus Curiae James J. Clancy [V] was Counsel of Record for Allen County, Ohio Prosecutor Huffman (hereinafter "Huffman") in Huffman's two cases in 1975. A duplicate copy of the Jurisdictional Statement and the Petition for Rehearing in ***Huffman v. Pursue, Ltd.***, No. 73-296 and the Motion for Leave to File a Petition for Writ of Mandamus and Petition for Writ of Mandamus in ***Huffman v. U.S. District Court***, No. 72-1613 Misc. was filed with this Court as "Exhibits 1A, 1B and 1C" to the Petition for Writ of Mandamus in ***In Re Murphy***, No. 98-1442, with a request that this Court take Judicial Notice of such pleadings.

II (A) The Critical Status of the Ohio State Court's Jurisdiction and Huffman's Dilemma.

The final judgment which closed the Cinema I Theater in Lima, Ohio as a Moral Public Nuisance in the Ohio public nuisance case was filed on November 30, 1972. The attorneys for the theater transferred the ownership to a newly formed Corporation and on the next day (December 1, 1972) filed a civil rights action in the U.S. District Court attacking the constitutionality of the Ohio Public Nuisance Statutes (which required Appellate review by a three judge federal court).

On December 1, 1972, the date the action was filed (which is the date upon which the subject matter jurisdiction of the federal court is routinely tested and determined), the Common Pleas Court in Lima Ohio still had statutory jurisdiction for 30 days for the purpose of considering post trial motions, the filing of a notice of appeal and motions for attorneys' fees, etc.

In the two ***Huffman*** cases which were before this Court,

V Amicus Curiae James J. Clancy also was and is counsel of Record for Clarence F. Murphy in his Petition for Writ of Mandamus in ***In Re Murphy***, U.S. Supreme Court No. 98-1442, October Term 1998. See **Point III**, infra, at **pages 18-24**, and see **Appendix C** to this Amicus Brief.

Huffman made a determined effort to focus the Court's attention on Lack of "Subject Matter Jurisdiction" which, according to this Court's prior precedents was and is always to be the first order of business (see ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83 [March 4, 1998]) and properly belonged in the Ohio State Court System. This tactic was absolutely essential to the prosecutor's success, so that he could stop the federal interference and get a definitive appellate ruling on the "closure" procedure by the Ohio Supreme Court in this ***Huffman*** "test case" (which ruling would also be available as "precedent" in other State Public Nuisance Abatement cases [see **Appendix D** to this Amicus Brief at pages **D-8** through **D-11**] which were then being developed using the civil abatement process, and the Time and Motion Study and Film Continuity Study as real evidence for the prosecution, and the potential of an award of attorney's fees to cover the cost of abatement and closure of the Ohio Moral Public Nuisance).

II (B) Abdication of this Court's Primary Duty re Jurisdiction in *Huffman*– Ohio's Concern re Moral Depravity, an Important State Interest under the 10TH and 11TH Amendments.

Unfortunately, this Court, as in ***Cooper v. Mitchell Brothers' Santa Ana Theater***, infra, at **pages 24-25** to this Amicus Brief, avoided answering the lack of "subject matter jurisdiction" question which was squarely raised in the (original) Petition for Leave of Court to File a Petition for Writ of Mandamus after Solicitor General Robert Bork informed the Court that the "Jurisdictional Statement" on the mandatory appeal had been filed in the interim and that the "jurisdiction" question "could" (not "would") be addressed in that case when this Court heard that appeal pursuant to its mandatory appellate jurisdiction of the three Judge Court Judgment.

In 1973, the National need for a decision and an extraordinary writ upholding the subject matter jurisdiction of a state court on important state matters such as the abatement

of moral public nuisances pursuant to **Chapter 3767** of the **Ohio Revised Codes** and the **10TH and 11TH Amendments** was abundantly clear. The "moral depravity" which then was being exhibited by the escalating pornography industry and porn industry films, such as the film "Deep Throat", (which "glorified" sodomy per o.s. [oral sodomy]) were appearing as the regular fare at the Cinema I Theater in Lima, Ohio and on motion picture screens in each of the 50 States. The federal courts were wrongfully being employed by the porno industry to interfere with the **10TH and 11TH Amendment** efforts of law enforcement to produce real evidence of such hard-core films in the state courtrooms using: **(1)** the search warrant process; and **(2)** the subpoena duces tecum process. See, for example, ***Hicks v. Miranda***, 422 U.S. 322 (1975) as an example of the intrusive litigation faced by law enforcement.

In May of 1973, the depravity that files like "Deep Throat" represented in its graphic depictions of "oral sodomy" (o.s.) was uniformly recognized as being contrary to the "Natural Law" and Judaeo Christian moral standards, and acknowledged as such by an overwhelming majority of the legal profession. 23 years earlier (1950), Professor Rollin M. Perkins, now Connell Professor of Law Emeritus, U.C.L.A. Professor Emeritus, University of Hastings College of Law had instructed Amicus Curiae herein (as a first year law student in Prof. Perkins' criminal law class at U.C.L.A.), and later published in his definitive text on the Criminal Law, that the Common Law in the United States with respect to this subject (oral sodomy) and "public morals" was clearly defined and well documented. [2]

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[2] See text of ***Perkins*** on **Criminal Law** (at pages 465-466), *the Foundation Law Press*, 3RD Ed., (first published in 1955), which reads in part:

> " The ancient city of Sodom, reputedly destroyed because of its unspeakable vices, is the source from which the word 'sodomy' is derived. The offense was regarded with such abhorrence in the early days that Blackstone literally refused to name it, referring to it only as 'the infamous *crime against*

II (C) The Prosecuting Attorney's Interests Versus This Court's Interests in *Huffman*.

In both cases, Huffman asked that the U.S. District Court Order be vacated and that the case be remanded to the Ohio Judicial System (so that a final appellate decision could be achieved).

The "Questions Presented" at pages 5-9 and the "Statement of Facts" at pages 9-28 of the Petition for Writ of Mandamus in No. 72-1613 Misc. was purposely comprehensive [2] and tailored to the Prosecutor's special needs so that anyone in the appellate chain who later undertook a study of those documents would immediately recognize the validity of the jurisdictional issue being raised and the need for an issuance of a **Rule *Nisi*** re jurisdiction.

This Court was thinking of the Federal Judiciary's own National needs, and was not (primarily) interested in the practical aspects of the Public Nuisance Abatement case in relation to the "real" needs of the State of Ohio.

At Oral Argument, Justice Stewart asked if Ohio would be satisfied if the ***Younger* Rule** in criminal cases were extended to civil proceedings. Prosecutor Huffman answered "No", in that, under this Court's own precedents, it must first address the question of "subject matter jurisdiction"– i.e., whether the case was properly before the Court– realizing that the State of Ohio had a very real need for its presence in the State of Ohio and an Ohio Appellate Ruling by the Ohio Supreme Court, and the U.S.

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nature.' [25] 4 Bl.Comm. *215. " (Our Emphasis.)

[2] See, in particular, at "Appendix C", pages C-7 through C-10, the pleading by reference of the time/motion studies of the films named, at paragraph 7(j) and 10(c) of the Complaint to abate the Cinema I Theater as a public nuisance.

District Court had interfered with the **11TH Amendment** subject matter jurisdiction of the State of Ohio Judicial System, as to an important State Interest which could and should be addressed in the State Court.

Amicus Curiae James J. Clancy recalls that, during oral argument, with knowledge of what was happening in "society" (in the "real world", the State Courts were being ham-strung by "technical" procedural decisions in their attempts to introduce the "prints" of hard-core pornographic films like "Deep Throat" in evidence before the State Courts on the merits) he stated, as his opinion, that the federal courts' ruling in the ***Huffman*** case was underwriting "cocksucking and whore mongering"– language never before used by Amicus Curiae in his professional career, or in conversation. Amicus Curiae had determined that he would "sound" this "warning prediction" to the Court if such a statement became necessary. It was necessary, but proved to be ineffective. A majority of the Court was determined to extend the ***Younger* Rule** to civil cases, and would say or do no more.

Unfortunately, the fractured nature of the Court in 1975 prevented the Justices from coming together on the **11TH Amendment** issue. Instead of remanding the case to the Ohio Judicial System for further proceedings, the majority of Justices complied with their duty by addressing the jurisdictional issue obliquely in a technical sense and formulated the **"*Huffman* Abstention Doctrine"** (as a proper response to the legal profession pursuant to the rudimentary rule of law that this Court always has jurisdiction to determine jurisdiction). Proof of the correctness of this "jurisdictional" analysis can be found in the last paragraph of the Court's Opinion in ***Huffman v. Pursue, Ltd.***, supra, (see **page 3** of the Motion for Leave to file an Amicus Curiae Brief).

II (D) The Battle was Won, but the "War" was Lost. This Court Can, and must Correct That Defect.

That Huffman had prevailed on his appeal was no great victory. The "battle" was won, but the entire war against such obscene hard-core pornography was lost. Huffman acknowledged that reality by filing a Petition for Rehearing, which was summarily denied. The case was not remanded back to the Ohio Appellate Courts for their consideration, as requested by the State of Ohio in its Appeal, and the "closure" issue which was then before this Court was never resolved. ***Pursue, Ltd.***, the Plaintiff in the Federal District Court, refused to litigate further and disappeared. [4]

III. INTEREST OF THE AMICUS CURIAE: STATEMENT OF THE CASE OF CLIENT CLARENCE F. MURPHY, IN THE U.S. SUPREME COURT IN CASE NO. 98-1442.

In Case No. 98-1442, Planned Parenthood wishes to construct and operate an abortion clinic in Bettendorf, Iowa. [5]

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[4] See **Appendix D** to this Amicus Curiae Brief, being a contemporary historical account recently prepared by Amicus Curiae, writing of the disaster which resulted from the inability of law enforcement and the denial of the states' right under the **10TH** and **11TH Amendments** to obtain a resolution of the "closure" issue in the ***Huffman*** case, supra, and other state cases in which the Federal District Court wrongfully interfered with the State Court's pending action. See, also, the discussion as to the two ***Spokane Arcades, Inc.***, cases, infra, which were before this Court, as discussed hereinafter at **pages 25-29** to this Amicus Brief.

[5] Because this Court has refused to exercise its discretion and act upon Murphy's petitions and motions for relief from this Court, Planned Parenthood has been able to construct a Clinic. Planned Parenthood has not yet, however, been able to establish the right to operate an abortion clinic within 100 feet of Murphy's residential apartments under Iowa Law or the right of the U.S. District Judge Wolle to rezone the property from P.U.D. to C-5. See **Appendix C** to this Amicus Curiae Brief.

The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 Zone.

Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose a property in a PUD Zone within 200 feet of three relatively new residential apartment complexes and submitted an application for approval of a C-5 Zoning Ordinance.

Murphy and two other adjacent apartment owners within 200 feet of the Planned Parenthood property made a successful statutory protest (**20% Rule**) against the zone change, pursuant to **Bettendorf Zoning Code, §24.2 and §24.4** (see at **Appendix C** to this Amicus Brief, Murphy's Iowa District Court Petition for a Declaratory Judgment filed on December 7, 1999 as a means of attacking and solving U.S. District Judge Wolle's refusal to allow Murphy to litigate Judge Wolle's egregious rulings in the Federal Court), which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 in favor of the Zoning Ordinance. The City Council aligned itself with the protesters and on March 19, 1996 voted 5-1 to reject the C-5 Zoning Ordinance. That quasi-judicial order was not appealed and is now final and ***Res Judicata*** under Iowa Law.

Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The **8TH** Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983).

Under Iowa case law, a city council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If an appeal is not filed within 30 days, the city council's actions become final, in which case, under the **11TH Amendment** and ***Huffman v. Pursue Ltd.***, 420 U.S. 592

at 606, fn. 18 and 19 and the progeny of ***Huffman***, and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8TH 1995]), the city council's quasi-judicial order is both final and ***Res Judicata*** under the U.S. Supreme Court decisions.

On March 21, 1997, one year and two days after the City Council's rejection of the C-5 Zoning Ordinance, Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court, pleading what is, in essence, an appeal from the March 19, 1996 decision of the Bettendorf City Council which considered essentially the same issues and facts and denied the application for the C-5 Zoning Ordinance in a quasi-judicial order which was not appealed to the Iowa District Court. The federal complaint: **(1)** did not name the three adjacent apartment owners who made the successful statutory protest as defendants; and **(2)** demanded attorney's fees under **42 U.S.C. §1988**.

The City of Bettendorf filed a Summary Judgment Motion, pursuant to the ***Huffman*** **Abstention Doctrine** and the ***Res Judicata*** **Doctrine** which Judge Wolle egregiously denied.

Upon conclusion of the federal trial, Judge Wolle entered a judgment which purported to rezone the property from P.U.D. to C-5 Zoning and awarded very substantial attorney's fees to Planned Parenthood under **42 U.S.C. §1988** which would not have been available under Iowa Law had an appeal been taken to the Iowa District Court following the denial of the C-5 Zoning Ordinance.

Murphy moved to intervene in the U.S. District Court immediately after the City of Bettendorf ("***parens patriae***") announced its decision not to appeal, for the purpose of appealing U.S. District Judge Wolle's Judgement on **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and other jurisdictional grounds, including Judge Wolle's denial of the City's Summary Judgment Motion on its plea of ***Res***

Judicata.

Judge Wolle: **(1)** cited one case authority (the "cited" case actually upheld the mandatory right of Murphy to intervene) and ruled "cursorily" on Murphy's "extensive" pleadings that the Intervention Motion was "untimely"; **(2)** refused to address the merits of Murphy's right to mandatory intervention (or the "reasoning" behind the Court's "cited" authority); and the **11TH Amendment**; ***Res Judicata***, and other Jurisdictional claims raised at the time of Murphy's Intervention Motion, and **(3)** refused to hear oral argument on the intervention and jurisdictional claims.

In the Court of Appeals below, Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two forms: by the filing of a direct appeal and the filing of an original action (a verified complaint pursuant to a Petition for Writ of Mandamus) in the 8TH Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

In a highly unorthodox ruling, which is totally inconsistent with Federal Practice, the 8TH Circuit Court of Appeals treated Appellant Murphy's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus, as though they had been consolidated and, in a brief single order, summarily denied the petition for Writ of Mandamus without an opinion, and summarily affirmed Judge Wolle's Judgment, also without opinion. The 8TH Circuit Court of Appeals also denied a petition for rehearing and suggestion of a hearing en banc in each of the two cases.

Murphy contended in his Petition for Writ of Mandamus, pursuant to the U.S. Supreme Court's original jurisdiction: **(1)** that Planned Parenthood has not stated, and cannot state a **42 U.S.C. §1983** cause of action because it had an adequate remedy under Iowa procedure of judicial review by the Iowa District Court (see ***Allen v. McCurry***, 449 U.S. 90 at 100 [1980] and ***Parratt v. Taylor***, 451 U.S. 527 [1981]), and

(2) that it is not entitled to attorney's fees under **42 U.S.C. §1988** because Iowa and other state courts do not customarily award attorney's fees in litigation involving an appeal from a denial of a C-5 zoning ordinance and application of the **Bettendorf "Protest" Ordinance**; and **(3)** where, as here, a separate **42 U.S.C. §1983** cause of action is pleaded and relied upon, it must be tried in the Iowa District Court because of the **11TH Amendment** bar, and ***Res Judicata*** defense which has been pleaded; and **(4)** in any event, Judge Wolle's Judgment must be reversed because, at this state of the proceedings, the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control the disposition of this case and mandate that the Federal Judgment must be vacated for lack of **Article 3, §2** subject matter jurisdiction.

Murphy contended he is entitled to a **Rule *Nisi*** pursuant to **28 U.S.C. §1651(a)** correcting the egregious refusal of both Courts to address the issue of "lack of **Article 3, §2** subject matter jurisdiction" under his **11TH Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83 (March 4, 1998) (duty to address the question of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S. 139 (1993) (creating a new Rule of Court re the issue "lack of subject matter jurisdiction"); ***Wisconsin Dept. of Corrections v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. Dist. Ct.***, 426 U.S. 394 (1976); ***Will v. U.S.***, 389 U.S. 90 (1967); and **Supreme Court Practice**, *7TH Ed.*, ***Stern, Gressman, Shapiro, Geller*, ©1993** at page 495.

III (A) Adequate Relief Cannot Be Obtained by Murphy in Any Other Forum or from Any Other Court for the Following Reasons:

"Adequate Relief" in the above context means "giving notice to the U.S. District Courts and the U.S. Courts of Appeals in the 11 Circuits, that the ***Huffman*** **Abstention Doctrine** is "Jurisdictional" and that the Planned Parenthood Civil Rights Action must be dismissed on those grounds where the ***Huffman*** test has not and cannot be met. This requires a reexamination of this Court's opinion and decision in ***Huffman v. Pursue, Ltd.***, supra.

III (B) The Refusal of a Majority of Federal Courts to Acknowledge the "Jurisdictional" Aspect of the *Huffman* Abstention Doctrine in Such a Situation, Where Each Party Claiming Jurisdiction in a Different Entity, Manifests a Need for Re-Examination of the *Huffman* Cases.

Murphy contends that the rule of law re lack of **Article 3, §2** subject matter jurisdiction under this Court's opinion in ***Huffman v. Pursue, Ltd.***, supra, has existed for the past 24 years as an **11TH Amendment** right; yet few of the federal courts consider themselves bound thereby. See in this regard, U.S. District Judge Myron H. Thompson's analysis at **pages 3-5,** infra, to this Amicus Brief.

When faced with Murphy's lawful right to intervene as an indispensable party and to contest the U.S. District Court's actions (requiring the construction of an abortion clinic within 200 feet of his apartment complex) pursuant to Murphy's claim of lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine**, the ***Rooker-Feldman*** **Abstention Doctrine**, (***Rooker v. Fidelity Trust Co.***, 263 U.S. 413 [1923] and ***Dist. of Columbia Court of Appeals v. Feldman***, 460 U.S. 462 [1983]), the ***Res Judicata*** **Doctrine** and the ***Stare Decisis*** **Doctrine**, both the

U.S. District Court and the U.S. Court of Appeals for the 8TH Circuit dismissed such claims without an explanatory judicial opinion, in utter disregard of this Court's repeated admonitions that a federal court must rule on the jurisdictional issue as its first order of business.

Murphy submits that, in the light of what is said above about the background of the rule of law expressed in ***Huffman v. Pursue, Ltd.***, supra, and the great harm which has resulted from this Court's having refused to "squarely" address the **11TH Amendment** jurisdictional aspect of the ***Huffman*** case, this Court should clarify the rule of law on "lack of **Article 3, §2** subject matter jurisdiction" in ***Huffman***.

CONCLUSION

The Refusal of The Federal Courts of Appeal to Recognize And Treat The Right of The State Judiciary to Interpret New Legislation Under *Watson v. Buck* Abstention as an 11TH Amendment Right Involving Important State Interests And State Public Policy Has Had a Devastating Effect on Law Enforcement in The Public Morals Area And Needs to Be Corrected (See Appendix D to This Amicus) And in a Forceful Manner by Vacating the Judgments and Sending All of The Partial Birth Abortion Cases Which Are on Its Docket Back to The State Courts For Their Initial Interpretation And Construction.

On November 30, 1981, this Court handed down its 6-3 decision in ***(California ex rel.) Cooper v. Mitchell Brothers' Santa Ana Theater, etc., et al.***, 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. 172 (1981), in which Justice Sandra Day O'Connor voted with the majority to reverse the Orange County Superior Court Trial Judge for his having instructed the jury on the "beyond a reasonable doubt" criminal standard, rather than the "clear and convincing evidence" equity standard; yet, nevertheless, this Court refused to address the most-important question on the right at **Common Law** to close the

Mitchell Brothers' Santa Ana Theater as a public nuisance. See, in this regard, the trouble that existed at that time (1981) with regard to law enforcement as set forth in this Brief at **Appendix D**: **Title page** and **pages D-8** through **D-11** (and still exists, as can be seen from the recent opinions on Partial Birth Abortion Litigation). Note also, that the California Supreme Court refused to rule on "closure" because of this Court's restraint on that issue. See **Appendix D** at **page D-8** and **D-9**.

Three weeks before the decision in the above Santa Ana Abatement lawsuit, this Court handed down a 6-3 decision in ***Brockett v. Spokane Arcades, Inc.***, 454 U.S. 1022, 70 L.Ed.2d 468, 102 S.Ct. 557 (1981) (hereinafter referred to as ***Brockett 1981***) which upheld a 9TH Circuit Court of Appeals Judgment which rubber-stamped a U.S. District Court's improper interference with a Washington State Initiative Measure and, in effect, prevented all law enforcement in the 50 States from acting upon the historical **English Common Law** problem of the "Common Nuisance".

The Washington State Initiative in ***Brockett 1981*** contained the Public Nuisance Abatement Law that this Amicus had authored for the State of Washington, which was clearly severable. Amicus had also filed an Amicus Curiae Brief for the City of Santa Ana in support of the Washington State Initiative which contained a comprehensive review of the public nuisance abatement cases. See the copy lodged with the Clerk of this Court concurrently with the filing of this Amicus Curiae Brief in ***Stenberg v. Carhart***.

Notwithstanding the U.S. District Court's clear **11TH Amendment** violation of the ***Watson v. Buck*** **Abstention Doctrine**, this Court on November 9, 1981 affirmed by a 6-3 vote the 9TH Circuit's interference in ***Brockett 1981***, supra.

The Dissenting opinion which Chief Justice Warren Burger filed in ***Brockett 1981***, three weeks before the Court's decision in the abatement lawsuit in ***Cooper v. Mitchell***

Brothers' Santa Ana Theater, supra, explained what was the fundamental problem with such federal interference in 1981. See a copy of Chief Justice Burger's dissenting opinion at **Appendix E** to this Amicus Brief and in 454 U.S. at 1022-1023:

> " The Court today affirms a decision of the Court of Appeals holding unconstitutional a Washington statute with has yet either to be enforced in or construed by a Washington state court. I would abstain from decision until the Washington courts are given an opportunity to interpret the law which has been thus invalidated. This Court– and all federal courts– have enough to do without 'pre-empting' state courts on matters initially of state concern.
>
> " The Washington 'moral nuisance' law, Wash Rev Code §7.84.050 et seq. (Supp 1977)– a comprehensive statute directed at prohibiting the public sale and exhibition of obscene materials– was adopted as an initiative by the voters in the November 8, 1977, election. Before the statute was even certified by the Secretary of State, appellees, several corporations engaged in the exhibition, distribution, and sale of movies, books, and magazines, filed this action in the Federal District Court. On February 6, 1978, less than three months after the initiative's adoption, and apparently before it had ever been applied, the District Court declared the law unconstitutional. 449 F.Supp. 1145.
>
> " I have previously outlined the concerns that should lead a federal court to stay its hand in cases such as this, when litigants have deliberately avoided resort to the court of the state whose statue is being challenged. Vance v. Universal Amusement Co., 445 U.S. 308 . . . (1980) . . . The policies of federalism and comity militate in favor of affording state judges– who are as capable as are federal judges of enforcing the

> Constitution of the United States, and have taken the same oath to do so– the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would. . . .
>
> " . . . Even a cursory examination of the lengthy statute– which contains detailed definitions of 'lewd' or 'obscene' matter incorporating the standards of Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), which provides for consolidation of the trial on the merits with the hearing on the temporary injunction and grants scheduling priority to cases brought under the statute, and which does not specify the defenses available in contempt proceedings– discloses that the state courts might well have construed the law so as to avoid each of these perceived deficiencies. It is ironic that, having exhibited no hesitation to construe the many provisions of this complex statue without guidance from the state courts, the Court of Appeals, wholly ignored an explicit severability clause and 'declined' to preserve those parts of the statute *not* found unconstitutional, demurring that the reconstruction required to salvage the statute would be better handled by 'the legislature of the State of Washington.' 631 F.2d at 139.
>
> " In sum, both the District Court and the Court of Appeals should have declined to act until the parties had exhausted available state remedies, at least absent a showing that resort to the state court would have been futile. There was no need whatever for federal courts to render a declaratory judgment as to the validity of a state law on which the state courts have not yet had an opportunity to speak and on behalf of parties against

> whom the law has not yet been applied. I would reverse and remand with directions to do now what should have been done initially." (Our emphasis.)

Four years later, this Court considered ***Brockett v. Spokane Arcades, Inc.***, 472 U.S. 491, 86 L.Ed.2d 394 at 408-410, 105 S.Ct. 2794 (1985) (hereinafter referred to as ***Brockett 1985***) which reconsidered the same statute and same problem. In this instance, Justice O'Connor reversed herself in a concurring opinion which hit the nail on the head. See her opinion in ***Brockett 1985*** at **Appendix F** to this Amicus Brief, which is highlighted in black stars, and note also, that Justice O'Connor in 1985, in voting the exact opposite of her vote in 1981 when she voted to affirm the 9TH Circuit's interference, told the 9TH Circuit additionally that:

> "Because I believe that the Federal Courts should have abstained and allowed the Washington Courts an opportunity to construe the state law in the first instance, I think the proper disposition of these cases would be to vacate the judgment of the Court of Appeals on that ground." (My emphasis.)

Here this Court also reversed itself and did a masterful evaluation of the same issue that faced the Court in 1981 and 1985.

This same problem is now before this Court in the abortion cases in the year 2000 and those cases should be dispatched as a single package in the same manner; i.e., vacate all of the federal judgments and send the Partial Birth Abortion Statutes (both criminal and civil) back to the state courts for an initial interpretation and construction by the state judiciaries.

In this case of the Nebraska Abortion legislation in ***Stenberg v. Carhart***, the State of Nebraska has the same public policy as the State of Washington. See at **Appendix F** to this Amicus Brief, Justice White's opinion in ***Brockett 1985***

(***Brockett v. Spokane Arcades, Inc.***, supra, 472 U.S. 491 at page 506, headnote 6; and ***Nebraska v. Divis***, supra, which is referred to at **pages 6-9** to this Amicus Brief). See also **Questions I** and **II** at **pages i-ii** to this Amicus Brief.

The ***Brockett 1985*** Proposition of Law expressed in Justice O'Connor's concurring opinion should control these abortion appeals. See, also, in this regard, Justice Kennedy's argument with Justice Tang in the two opinions in ***World Famous Drinking Emporium, Inc. v. City of Tempe, Arizona***, 820 F.2d 1079 (9TH Cir. 1987), copies of which are set forth at **Appendix G** to this Amicus Brief which reflects Justice Kennedy's **11TH Amendment** judgment. To achieve this end result, this Court should grant certiorari in ***Bill Pryor v. Summit Medical Associates***, No. 99-1041, which is squarely in point, and all of the other abortion cases, including ***Hope Clinic v. Ryan***, No. 99-1177, Petition for Certiorari filed January 14, 2000, and ***Hope Clinic v. Ryan***, No. 99-1152, Petition for Certiorari filed January 10, 2000, and ***Hope Clinic v. Ryan***, No. 99-1156, Petition for Certiorari filed January 10, 2000 and return them all to the state courts pursuant to the **11TH Amendment**.

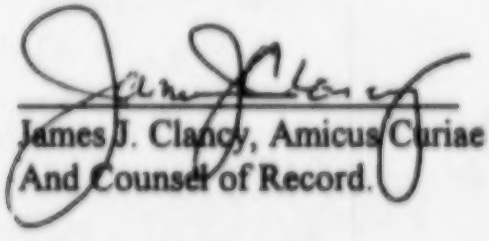
In these abortion cases, it is abundantly clear that the Federal Court does not have **Article 3, §2** (statutory) federal subject matter jurisdiction as a matter of law, because the Attorney General, in no way is acting like a "rogue". Quite the contrary, he is performing his duties in a customary manner. The state courts should have jurisdiction under the **11TH Amendment of the U.S. Constitution**. This is the "either - or situation" that always exists when a federal court wrongfully deprives a state court of its right to **11TH Amendment** jurisdiction and the state challenges the federal court's assertion of subject matter jurisdiction. A state government can do nothing to repair the damage after the federal judgment declares, as in ***Brockett 1985***, that the federal interference in ***Brockett 1981*** was a constitutional error. This Court should correct this imbalance in the law by focusing on

and addressing the problem squarely with a grant of its writ of certiorari in ***Bill Pryor v. Summit Medical Associates***, supra, and as an acknowledgment of that which is the basis for the ***Younger - Huffman*** **Abstention Doctrines**; namely, ***Watson v. Buck***, supra, as the ***Watson v. Buck*** **Abstention Doctrine** is factored into the ***Younger*** and ***Huffman*** opinions.

In sum, the States of Alabama and Nebraska have the right of a sovereign state, under the **11TH Amendment**: **(1)** to enact a statute which criminalizes "Infanticide" and to outlaw the inhuman practice of partial birth abortion in those States; **(2)** to have that "Infanticide" criminal statute and the partial birth abortion proscription interpreted by the Alabama and Nebraska Supreme Courts and given a constitutional interpretation, if possible, under ***Watson v. Buck***, supra; **(3)** to rely upon the **Doctrine of Separation of Powers** which mandates that a state statute must be "saved", if possible, by the State Supreme Court, rather than struck by the federal courts (which cannot "interpret" a state statute); and **(4)** to answer any constitutional challenge in the State Court without being liable for attorney fees (compare **42 U.S.C. §1988**); where the exception created by ***Dombrowski v. Pfister***, supra, is not available because the statute is not unconstitutional in every sentence, clause, etc., nor is the Alabama or Nebraska Attorney General's conduct in the nature of that which is required for ***Dombrowski*** to be operational in the face of a ***Younger*** **Abstention Doctrine** challenge. Further, a decision by a federal court in the absence of the above process, is merely advisory.

Dated: **February 28, 2000**

Respectfully submitted,



James J. Clancy, Amicus Curiae
And Counsel of Record.

APPENDIX A

"DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW"

A-1 **IN *CARHART V. STENBERG*, 11 F.SUPP.2D 1099, 1106 (D.NEB. 1998), THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DESCRIBED THE PARTIAL-BIRTH ABORTION PROCEDURE USED BY FEDERAL PLAINTIFF CARHART ON A "HEALTHY" FETUS AS FOLLOWS ON A-1:**

A-2 **PICTURE AND ARTICLE FROM THE IRISH INDEPENDENT NEWSPAPER ONLINE, DATED OCTOBER 30, 1999, DESCRIBING AN OPERATION TO CORRECT "SPINA BIFIDA" ON A 21-WEEK-OLD FETUS, "SAMUEL ARMAS" ON A-2:**

A-7 **PICTURE FROM LIFE MAGAZINE, DECEMBER 1999, SHOWING AN OPERATION ON A "SICK" 24-WEEK-OLD FETUS IN JULY, 1999, ON A-7:**

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ... Page 1, lines 22, 38, ... Page 2, line 2.)

Due Process and Equal Protection Under the Law: The Abortionist

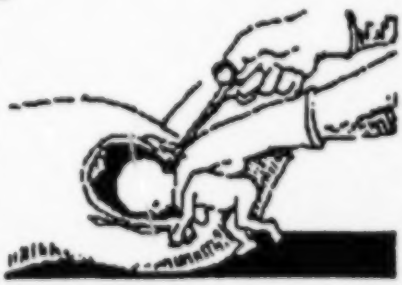
❶

". . . Carhart, using forceps, pulls the feet of the living fetus from the uterus into the vaginal cavity and then pulls the remainder of the fetus, except the head, into the vaginal cavity

❷

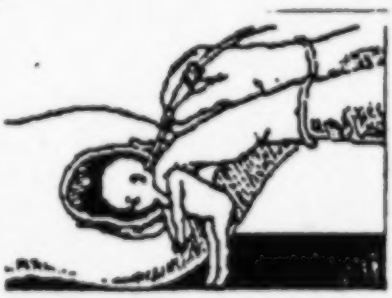
to a point where the base of the fetal skull is lodged in the uterine side of the cervical canal. At that point, the size of the head will not permit him to pull it through the cervical canal into the vaginal cavity.

❸



To decompress the fetal skull and evacuate the contents in order to pull it through the cervical canal, Carhart uses an instrument to either tear or perforate the skull to allow insertion of a cannula and removal of the cranial contents.

❹



Sometimes he will crush the skull rather than pierce it in order to reduce the size of the skull. Brain death occurs sometime during this two-to-three-second reduction procedure, but fetal heart function may continue for several seconds or minutes after the fetus's skull is decompressed."

Due Process and Equal Protection Under the Law:
The Physician

IRISH INDEPENDENT NEWSPAPER ONLINE
30 October, 1999,
http://www.independent.ie/1999/302/d20a.shtml

Holding hands

Take a good look at this picture. It's one of the most remarkable photographs ever taken. The tiny hand of a foetus reaches out from a mother's womb to clasp a surgeon's healing finger. It is, by the way, 21 weeks old, an age at which it could still be legally aborted. The tiny hand in the picture above belongs to a baby which is due to be born on December 28. It was taken during an operation in America recently. Paul Harris reports on a medical development in the control of the effects of spina bifida . . . and on a picture which will reverberate through the on-going abortion debate here.

Your first instinct is to recoil in horror. It looks like a close-up

of some terrible accident. And then you notice, in the centre of the photograph, the tiny hand clutching a surgeon's finger.

The baby is literally hanging on for life. For this is one of the most remarkable photographs taken in medicine and a record of one of the world's most extraordinary operations.

It shows a 21-week-old foetus in its mother's womb, about to undergo a spine operation designed to save it from serious brain damage.

The surgery was carried out entirely through the tiny slit visible in the wall of the womb and the "patient" is believed to be the youngest to undergo it.

At that age the mother could have chosen to have the foetus aborted. Her decision not to, however, led to an astonishing test not just of medical technology, but of faith.

Samuel Armas has spina bifida, which left part of his spinal cord exposed after the backbone failed to develop.

The operation was designed to close the gap and protect the cord, the body's motorway for nerve signals to the brain.

So, on an unborn patient no bigger than a guinea-pig, the operation was performed without removing the foetus from the womb.

The instruments had to be specially designed to work in miniature. The sutures used to close the incisions were less than the thickness of a human hair.

An ER-style crash-cart team was on constant standby in an adjoining room.

When it was completed, however, Samuel's battle for survival was only just beginning. Nor would the emotional battle his parents had already endured finish quite yet.

Julie and Alex Armas had been trying desperately for a baby.

Julie, a 27-year-old nurse, had suffered two miscarriages before she became pregnant with the child they intended to call Samuel Alexander if it was a boy

Then, at 14 weeks, she started to suffer terrible cramp. An ultrasound scan was carried out to show the shape of the developing foetus and its position in the womb.

When the picture emerged, it was the moment that every parent-to-be dreads. Their unborn son's brain was mis-shapen and his spinal cord was sticking out from a deformed backbone. He had spina bifida. They were devastated and "torn apart" said Alex, a 28-year-old jet aircraft engineer.

At that stage, and even weeks later, the couple could have decided to have the pregnancy terminated. In their home town of Georgia in the U.S. as in Britain abortion is routinely offered. Although accurate figures are not available, many parents accept. For Julie and Alex, who are deeply religious, it was not an option.

That didn't mean, of course, that they were not racked by pain at the thought that the child they had longed for was imperfect.

It also riddled them with guilt over whether they had effectively taken the decision to inflict their son with years of handicap, pain and suffering.

So, this being the United States, they turned to the internet for help.

Julie's mother found a website giving details of pioneering surgery being carried out by a team at Vanderbilt University in Nashville, Tennessee. Although the results have not yet been endorsed in medical journals, they looked encouraging to Mr. And Mrs. Armas.

Their doctor put them in touch with Dr. Joseph Bruner (it is his finger in the photograph). A race against time had begun.

Because it affects the spinal cord, spina bifida can lead to a

condition that causes brain damage. Mr and Mrs. Armas were told that if they were to avoid the condition, which was not then present in Samuel, they had to act fast.

"I wasn't concerned about a child who couldn't walk," said Julie, "but I want a child who knows me."

The theory behind the surgery is that attention to the spine disorder before the baby is born prevents or limits brain damage, and gives a better chance of healing. It does not cure spina bifida, but it is said to provide a strong chance of limiting the damage through early intervention.

The risks, however, are enormous. Controversy surrounds the use of such surgery because it goes against the general medical rule that the risk should not outweigh the benefit.

Mr and Mrs Armas were fully aware that if anything went wrong, no attempt would be made to deliver Samuel by Caesarean section.

Medical science does not yet have the capability to keep a 21-week-old foetus alive outside the womb. The crash-cart was on standby for Julie, not Samuel.

"If he dies, that's horrible for me and for us," said Julie before she went into theatre. Wiping tears she added: "But not for him. The worst thing might be if we don't do this, and this is standard treatment when he's 21, and he says: 'Why didn't you know about that?' And we say: 'We did, but we didn't do it for you.' "

The other major dangers were turning him in the womb to get his back in line with an inch-long cut in the wall, through which Dr. Bruner would operate, and that the surgery might involve releasing the fluid around Samuel.

The movement posed the risk of sending Julie into labour contractions, which would have been fatal for Samuel.

Thus, one morning at the beginning of last month, Dr. Bruner

could be heard urging his team to keep quiet. "Shh!" he said. "You'll wake the baby!"

Robert Davis, who reported on the operation for U.S.A. Today newspaper, said the lesion that exposed Samuel's spine was found low on his backbone, decreasing the chance of nerve damage.

Although Samuel is believed to have been the youngest patient for such an operation, it was apparently routine enough for Dr. Bruner and paediatric neurosurgeon Noel Tullpant to talk about the weather during the opera ion.

An hour later, the womb is gently eased back into place. "Beautiful," said one of the technicians and relief swept the room.

Julie was allowed home with Alex within days. The baby is due on December 28.

He has not yet felt the touch of his mother's skin against his own and he knows nothing of life outside her womb. But perhaps Samuel Alexander Armas will be able to shake Dr. Bruner's hand again.

The calm before the abortion debate storm

By Justine McCarthy. Nobody could be unmoved by the powerful image of this tiny finger clinging to the surgeon's hand. A hand that can create modern miracles and save lives that might otherwise be doomed before they even begin. This picture is an emotive and compelling argument against the termination of abnormal pregnancies and it appears as Ireland braces itself for yet another visitation of the debate.

As the range of options outlined in the government Green Paper are being considered for the next instalment in the Irish debate, there is a sense of an uneasy calm before the storm. With assisted abortion technically legal here under the Supreme Court ruling in the X Case, pro-life organisations still continue to

lobby for yet another referendum on the substantive issue.

Dana's election to the European parliament last summer was indicative of the strong pro-life undercurrent in her constituency of Connacht-Ulster. Suggestions that similar candidates might be fielded throughout the country at the next general election are predicated on the belief that a referendum is still a possibility.

In fact, Dana indirectly raised the subject in Europe this week when she put down an amendment to the Union's budget seeking to end the funding monopoly enjoyed by the European Women's Lobby. She wanted to give some of the allocated ££480,000 to the World Movement of Mothers, an organisation Dana claimed to know little about but which others described as pro-life. The European Women's Lobby, an umbrella organisation that lobbies the E.U. on behalf of various womens groups throughout the Union, claimed that the proposed cut in its funding could jeopardise the jobs of its 10-strong staff.

Though, ultimately, no vote was taken on that amendment, it focussed the parliament's minds on the issue of abortion once again.

Nearly 6,000 Irish females are expected to travel to Britain this year for abortions. In this country, however, the debate has traditionally been concerned with crisis pregnancies rather than abnormal foetal development. In that respect, this extraordinary photograph may have more relevance to the debate in Britain where termination is legally available at 21 weeks - the age of the world's youngest known patient.

(End of Article)

LIFE MAGAZINE, December, 1999

Beforehand, Dr. Joseph Bruner gently lifts the right arm of the 24-week-old fetus in Trish Switzer's womb during surgery at Vanderbuilt University Hospital in July, 1999.

APPENDIX B

NEWSPAPER ARTICLES REPORTING A 1998 SCIENTIFIC "MISHAP" WHICH HAS RECENTLY BEEN BROUGHT TO THE PUBLIC'S ATTENTION WHEREIN IT HAS BEEN REVEALED AND ESTABLISHED BY IRREFUTABLE "LIVING" PROOF THAT "AN ENTIRE PERSON" WITH A SEPARATE AND DISTINCT D.N.A. IDENTIFICATION IS "CREATED" AT THE FERTILIZATION OF THE FEMALE EMBRYOS BY THE MALE SPERM, AND BEFORE THE IMPLANTATION IN THE WOMB OF THE FEMALE, WITH THE ANALYSIS OF THOMAS F. FEE AND OTHER NEWS ARTICLES OF SUCH "MISHAP".

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 1, line 22, ... Page 2, line 1.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

47

THE OREGONIAN 4/16/99

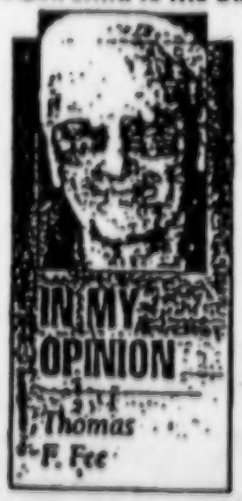
Embryo mix-up shows why Roe-Wade needs fixing

High Court should revisit 1973 ruling with eye on new technology, findings and DNA evidence on life in womb

The Oregonian, on March 31, published a news item headlined "Fertility mix-up causes anguish." According to this story, Dr. Lillian Nash, a fertility doctor in midtown Manhattan, inadvertently implanted embryos from a black couple, Deborah Perry-Rogers and Robert Rogers, along with the embryos from a white couple, Donna and Richard Fasano, into Donna Fasano's uterus.

Nash discovered the mix-up early in the pregnancy and told both the Rogerses and the Fasanos what had gone wrong. Donna Fasano underwent an amniocentesis, which determined that she was carrying two healthy babies, and a DNA test, which determined that only one of them was genetically hers. Since both babies were perfectly healthy, Donna Fasano decided to carry them to term, and in December 1998 she gave birth to two boys — one white, one black.

The Fasanos and the Rogerses and their attorneys are working together in a spirit of love and goodwill to resolve the issue and pending the results of a DNA test will give the black child to his biological parents to raise.



All's well that ends well?

Not quite. The birth of these two boys seems to refute some of the favorite lies of the pro-abortionists and the Supreme Court's decision that there is no "personhood" prior to birth.

Lie No. 1: "Nobody knows when life begins."

Obviously, the life of the black baby began at fertilization, and he was alive before implantation in the womb of Donna Fasano. His white mother's womb gave him a place for nourishment and to develop until birth. She neither gave nor took away anything from his body. All that he is now was all there at the moment of conception.

Lie No. 2: "It's her body."

The black baby obviously was not her body. The egg and sperm and fertilized embryo belonged to the Rogerses, and DNA proves that babies are separate and distinct persons and not a part of the mother's body.

Lie No. 3: The infamous Roe vs. Wade decision of 1973 stated that prior to birth there is no "personhood," and in the "penumbras" (shadow or gray area) of the Constitution lay a woman's right to privacy and abortion.

Since the black baby is the same "person" today as he was prior to implantation in the womb, he must have been the same "person" at his conception as he is now. So why doesn't the Constitution protect his right to "life, liberty and the pursuit of happiness"? The same fallacious argument of a "non-person" was used prior to the Civil War to deny blacks full citizenship.

Fortunately for all, Donna Fasano carried both babies to term. But suppose the white mother had aborted the black baby? Since the black baby wasn't hers (the egg and sperm belonged to the Rogerses), could she then have been prosecuted for murder? There have been cases alleging manslaughter or murder of an unborn baby being killed in the womb in automobile accidents, drive-by shootings and other deadly accidents involving a pregnant mother.

This birth calls into question the legitimacy of the Roe vs Wade decision. The Supreme Court should be required to revisit it based on present-day technology, DNA evidence and modern science's new findings of life in the womb.

Life begins at conception. The Rogerses know it. The Fasanos know it. All parents know it. It's time for the Supreme Court to correct its error before another 36 million babies die in the womb.

Thomas F. Fee of Sunriver is a member of the board of directors of Oregon Right to Life.

http://search.washingtonpost.com/w...O/19990330/V000893-033099-idx.html

Woman to Give Up Baby After Mix Up

Tuesday, March 30, 1999; 8:09 a.m. EST 3/30/99.

NEW YORK (AP) -- A white woman who gave birth to a black child after she was accidentally implanted with another couple's embryos will surrender the baby to the couple who are believed to be the biological parents, her lawyer said.

Donna and Richard Fasano will give up the 3-month-old boy "because we love him," they said Monday in a statement.

"We both want what's in the best interest of the child," Mrs. Fasano said.

Mrs. Fasano gave birth Dec. 29 to two boys, one black and one white.

The Fasanos decided to raise the white child and allow Robert and Deborah Perry Rogers to raise the black child if DNA tests confirm that they are his biological parents, said Mrs. Fasano's lawyer, Ivan Tantleff. They hope to get visitation rights.

"The Fasanos have reared, loved and cared for both children as their own," he said. "(Mrs. Fasano) doesn't look at them as white and black. She looks at them as her sons. She is torn apart by this."

The Rogerses, from Teaneck, N.J., sued over the case, seeking custody.

Court papers said that last April, 71-year-old Dr. Lillian Nash, in her Manhattan office, implanted eggs fertilized by their husbands in the two women's uteruses. Each couple had tried for years to conceive a child but had been unsuccessful.

Mrs. Rogers did not become pregnant from the procedure. Mrs. Fasano, however, became pregnant with twins.

The mix-up was discovered two weeks into her pregnancy. The doctor said several of Mrs. Rogers' embryos, deemed unsuitable for storage for use in a future attempt at pregnancy, accidentally were implanted in Mrs. Fasano along with her own.

Mrs. Fasano opted to go ahead with the pregnancy after learning the twins were healthy, even though one was not genetically hers, Tantleff said.

Mrs. Rogers was astonished by the news that the Fasanos would relinquish the black child, said her lawyer, Rudolph Silas.

"She was very excited to hear the good news and overwhelmed after so many failed efforts to conceive," he said.

The Fasanos were expected to meet the Rogerses, for the first time, in a few days.

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SUNRIVER REALTY 006
http://search.washingtonpost.com/w...O/19990331/V000551-033199-idx.html

Woman to Give Up Baby After Mix Up

By Beth J. Harpaz
Associated Press Writer
Wednesday, March 31, 1999; 4:12 a.m. EST 3/31/99

NEW YORK (AP) -- They are brothers, twins born of the same womb. One is black, the other white. It is a baby-switching case with a twist -- these babies were switched before birth.

Now the only mother either 3-month-old boy has ever known will return the child who does not share her DNA -- the black child -- to his genetic parents.

"We're giving him up because we love him," said Donna Fasano, 37, in a handwritten statement supplied by her lawyer Tuesday.

The babies ended up in the same womb because a doctor at a fertility clinic apparently mixed up Mrs. Fasano's embryos with those of another couple.

"Both of these boys are beautiful -- two precious, normal little boys," said her lawyer, Ivan Tantleff. "They sit in the swing together. They sit in the tub together."

The case began April 24, 1998, when Mrs. Fasano underwent embryo implantations in the Manhattan offices of Dr. Lillian Nash. Another couple, Deborah Perry-Rogers and Robert Rogers, sought help from the same clinic at the same time.

Both women underwent in vitro fertilization, in which their own eggs fertilized by their husbands' sperm were implanted into the uterus. Only Mrs. Fasano became pregnant.

Doctors discovered a problem a few weeks into Mrs. Fasano's pregnancy, when an amniocentesis exam revealed that although she was carrying twins, only one was her genetic son.

The clinic had apparently inserted some of Mrs. Rogers' eggs into Mrs. Fasano's uterus along with her own. Since both babies were healthy, Mrs. Fasano decided to carry them to term, her lawyer said.

The babies were born in December. Mrs. Fasano said she didn't know the other parents' identity until the Rogerses sued Nash, two other doctors and the Fasanos on March 16.

"This wasn't my doing," Mrs. Fasano said in her statement. "People with infertility problems should be able to go to their doctors and trust them to do the right thing. To them it may be a job; to me it's my life."

The state's health department is investigating the incident. A call to Nash's clinic was not returned Tuesday.

Tantleff said he is trying to arrange for visitation rights for the Fasanos "so the boys grow up to know that they are brothers."

Mrs. Perry-Rogers, a nurse, and her husband, a teacher, are amenable to visitation, their lawyer said Tuesday. "It's in the children's best interest," said Rudolph Silas.

Silas said his clients will likely get custody of the little boy in a few weeks, after DNA tests and legal papers are completed.

"My clients are both ecstatic," Silas said. "They are the proud parents of a 3-month-old baby boy. Of course there's some mixed emotions in the manner in which it's been brought to this point. But they're happy she made the decision she's made."

George Annas, a professor of health law at the Boston University School of Public Health, said Mrs. Fasano's decision "seems like a reasonable solution but it's got to be heart-wrenching."

The Fasanos' phone was out of service Tuesday and the Rogerses did not return a call. Their lawyers said the parents did not want to comment, and would not divulge the babies' names.

The Rogerses' suit accuses Nash, Dr. Dov B. Goldstein and Dr. Michael Obasaju of negligence, malpractice and breach of contract. Goldstein ran a different clinic where the Rogerses stored their embryos.

Lawyers agreed that the woman who gives birth is legally considered the child's mother regardless of DNA.

"I'm glad we don't have to contest that and litigate," Silas said "Her decision to do it voluntarily saves us a lot of heartache."

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3-31-99
THE OREGONIAN.

Fertility mixup causes anguish

■ Two couples struggle to sort out one of the more bizarre controversies in the history of reproductive technology

By MICHAEL GRUNWALD
The Associated Press

NEW YORK — Donna and Richard Fasano, a white couple from Staten Island, N.Y., were desperate to have a baby.

Deborah Perry-Rogers and Robert Rogers, an African American New Jersey couple, wanted a child, too.

Both couples visited the same fertility doctor in midtown Manhattan. Now it looks like both couples are going to get their wish.

But first they are struggling to sort out one of the more bizarre controversies in the history of reproductive technology.

In April, the doctor accidentally implanted embryos from the Rogerses, as well as the Fasanos, into Donna Fasano's uterus, and in December, she gave birth to two boys — one white, one African American. Monday, the Fasanos reluctantly agreed to give the African American infant to the Rogerses, as long as they and his "twin" brother are assured visitation rights.

This tale of two babies raises thorny questions about race, genetics, parenthood and the law, and provides a disturbing glimpse of the virtually unregulated world of in vitro fertilization.

"This is a kitchen-sink story; it raises almost every tough issue that has arisen from the advances in reproductive medicine," said Glenn McGee, a professor of bioethics at the University of Pennsylvania. "God help the judge that gets this case."

The Rogerses have filed a lawsuit against the Fasanos and the fertility specialist, Lillian Nash. They will drop the Fasanos as defendants once they take custody of the child that grew from their embryo.

Deborah Perry-Rogers had the couple's embryos implanted in her uterus as well but did not become pregnant.

The Fasanos also plan to file a malpractice suit against Nash sometime over the next few days. . . .

DNA tests pending

Donna Fasano said in a statement that the couple decided to surrender custody, pending a confirmatory DNA test, because "we both want to do what's in the best interest of the child." According to their lawyers, both couples are thrilled to be parents but outraged and distraught over the mistake at Nash's clinic.

"People with infertility problems should be able to go to their doctors and trust them to do the right thing," Fasano said in her statement. "To them it may be a job; to me, it's my life. She may have given me two beautiful babies but she destroyed their lives."

Nash, 71, did not return calls.

This was not the first mishap in the $1 billion-a-year high-tech birthing industry, which now accounts for about 20,000 annual live births, up nearly 450 percent in seven years.

In 1992, a Fairfax County, Va., doctor named Cecil Jacobsen was convicted of fraud and perjury after he secretly impregnated dozens of women with his own sperm.

In 1994, the University of California shut a fertility clinic after doctors were caught stealing harvested eggs for their research. In Utah, an egg was accidentally fertilized with the wrong man's sperm.

But this is the first known mix-up over gametes that has ended up with a woman giving birth to children of different races.

George Annas, a professor of health law at Boston University, said the custody question would have been quite clear had the Fasanos decided to fight it: Every state but California considers the birth mother, or "gestational mother," not the "genetic mother," to be the legal mother.

Good news, and bad

The saga began April 24, when Nash implanted the Fasanos' fertilized eggs into Donna Fasano's uterus, but inadvertently implanted some of the Rogerses' embryos as well. A month later, she contacted the Fasanos with the good news: Donna was pregnant. Two weeks later, she contacted the Fasanos and the Rogerses with the bad news: something had gone terribly wrong.

Fasano underwent an amniocentesis, which determined that she was carrying two healthy babies, and a DNA test, which determined that only one of them was genetically hers.

On Dec. 29, Donna Fasano gave birth to her unprecedented set of genetically distinct "twins." They have spent their first three months in the same crib, sharing the same clothes, sharing the same life. But after the Rogerses filed their suit two weeks ago — and after both couples agreed through their attorneys that the boys should grow up knowing they are brothers — the Fasanos made their anguished choice. "We're giving him up because we love him," Donna Fasano said.

Roe vs. Wade: A botched ruling that must be resolved

The Bulletin 5/14/99

A certain professor who teaches students who aspire to become speech pathologists begins by showing them the development of the various organs involved in speech. When he shows his class an ultrasound picture of the development of the palate in an unborn baby, it is not uncommon for one or two women in his class to have tears in their eyes, or to say to him afterward that they have had an abortion and were very much affected by seeing what an unborn baby looks like.

For too long we have been led to believe that an abortion is the removal of some unformed material, something like having an appendix operation. The very expression "unborn baby" has almost disappeared from the language, being replaced by the more bloodless and antiseptic term "fetus."

Many vocal advocates who declare themselves "pro-choice" do not want women to have the choice of knowing just what they are choosing before having an abortion. Ferocious opposition has stopped the showing of pictures of an abortion in process — even in schools or colleges that show movies of naked adults performing various sex acts. Still photographs of aborted fetuses have been banned as well.

Thomas Sowell

The particularly grisly procedure know as "partial-birth abortion" cannot even be referred to in much of the media, where it is called a "late-term abortion" — another bloodless term and one that shifts the focus from what happens to when it happens.

What happens in a partial-birth abortion is that a baby who has developed too far to die naturally when removed from his mother's body is deliberately killed by having his brains sucked out. When th is done, the baby is not completely out his mother's body because, if he were, doctor would be charged with murder. There is no medical reason for this pro dure, which has been condemned by t American Medical Association. There i only a legal reason — to keep the doct and the mother out of jail.

All this is smoothly covered over in the media by calling such actions a "la term abortion" and refusing to specify what happens. Such patterns of determined evasions and obfuscations show that "pro-choice" in practice often reall means pro-abortion. Knowledge is the first thing being aborted.

Philosophical questions about whe life begins may preoccupy some people both sides of the abortion controversy. But the raw physical facts of what hap pens in various kinds of abortion have turned many others, including physicians, from being pro-abortion to being anti-abortion. One doctor who had performed many abortions never performed another one after seeing an ultrasound movie of the baby's reactions.

With most other medical procedures, "informed consent" is the watchword. But, when the issue is abortion, great efforts are made to keep "choice" from becoming too informed.

Politically and legally, the abortion issue is too complex for any easy resolution. We have gone through a quarter of a century of bitter controversy precisely because the Supreme Court went for an easy resolution back in 1973 with the Roe vs. Wade decision.

Before then, various states had made differing efforts to wrestle with and balance the weighty concerns on both sides of the abortion issue. But Supreme Court Justice Harry Blackmun rushed in where angels fear to tread, washed down with the blatant lie that this was based on the Constitution.

Far from settling things, Roe vs. Wade has led to polarization and escalating strife all across the country, including bombings and assassinations. It has corrupted the media, academia and other sources that are supposed to inform us, but which have instead become partisan organs of political correctness.

However this highly charged issue is ultimately resolved surely honesty must be part of that resolution. Political catchphrases like "a woman's right to do what she wants with her own body" cannot be applied to situations where a baby is killed at the very moment when he ceases to be part of his mother's body.

One of the few signs of hope for some ultimate resolution is that most people on both sides of this controversy are not happy about abortions. The women who shed tears at the sight of an unborn baby may not be politically committed to either side of this issue, but their feelings may be part of what is needed to bring opposing sides together.

Sowell is a senior fellow at the Hoover Institute in Stanford, Calif.

A8 San Francisco Chronicle

5/22/99

Genetic Family Gets Boy After Clinic's Error

Black baby returned by white birth mom

ASSOCIATED PRESS

NEW YORK – A black baby born to a white couple because of a mix-up during implantation of embryos at a fertility clinic has been handed over to his genetic parents, court papers filed yesterday revealed.

The baby, born December 29 to Donna and Richard Fasano of New York, was given to the black couple, Deborah Perry-Rogers and Robert Rogers of Teaneck, N.J., on May 10 during a visit to the Fasano home. The baby is named Joseph.

A lawyer for the Fasanos, David Cohen, said the custody exchange was "very emotional, very strained, very difficult. This woman (Donna Fasano) had carried the baby to term, and had cared for him for four months."

The custody change came to light in papers filed in Manhattan's State Supreme Court where the Rogerses asked for declarations that they are the infant's parents and that they have permanent custody of him.

Donna Fasano, 37, also gave birth to a white boy – Joseph's fraternal twin – who is genetically hers and her husband's. The Fasanos have said they wanted the boys to grow up knowing each other as brothers.

"There has been a visitation agreement worked out, but I'm not going to talk about the details of it," Cohen said.

Deborah Perry-Rogers, 33, is a nurse; her husband, 35, is a teacher. Both the Fasanos work in finance.

The embryo imbroglio happened at the Manhattan fertility clinic of Dr. Lillian Nash. Donna Fasano and Deborah Perry-Rogers had stored fertilized eggs at the clinic, and both visited on April 24, 1998, for embryo implantation.

Nash's associate, Dr. Michael Obasaju, has admitted that he mistakenly put some of Deborah Perry-Rogers' embryos into a catheter used to implant Donna Fasano's embryos, a state Health Department report says.

The report concludes that Obasaju could have told Nash to stop the procedure immediately. Instead, investigators say, he prepared a second batch with the correct embryos and handed them to Nash for implantation.

He said he remained quiet about his original error because the wrongly implanted embryos were "lower in quality" and he did not believe they would grow.

While New York officials have maintained that the "real error" was made by the embryologist, the Health Department report also found that numerous procedural violations had taken place at the Manhattan clinic where the mistake occurred, and it cited Nash for failing to properly oversee Obasaju.

The Fasanos and the Rogerses have sued Nash and Obasaju for unspecified damages.

THE NEW YORK TIMES CONTRIBUTED TO THIS REPORT.

SATURDAY
July 17, 1999

News Digest

Black couple gets custody of baby

NEW YORK — A justice of the state Supreme Court in Manhattan ruled Friday that a black baby who was born to a white Staten Island woman after an embryo mix-up at a fertility clinic belongs in the permanent custody of his biological parents.

Justice Diane S. Lebedefv ruled that the biological parents, Deborah Perry-Rogers and Robert Rogers, a black couple from Teaneck, N.J., should have custody of the 8-month-old boy named Akiel.

The baby's birth parents, Richard and Donna Fasano, had filed suit to force the Rogerses to live up to a visiting agreement. Fasano gave birth to the boy and to her own biological son after a Manhattan fertility clinic mistakenly placed fertilized embryos from both couples in her womb.

SAN FRANCISCO CHRONICLE 5/27/99

A Wisconsin state appeals court judge has ruled Deborah Zimmerman (shown here at left with her attorney, Sally Hoelzel, in 1997) cannot be charged with attempted murder because a fetus is not a human being.

Associa

Fetal-Rights Case Dismissed – Mom Who Drank Goes Free

ASSOCIATED PRESS

MADISON, Wis. – A state appeals court yesterday threw out the case against a woman accused of trying to drink her fetus to death, ruling that she could not be charged with attempted murder because a fetus is not a human being.

In a case closely watched by civil libertarians and people on both sides of the abortion debate, the Wisconsin Court of Appeal ruled in favor of Deborah Zimmerman, whose daughter was born in 1996 with a blood-alcohol level of 0.199 percent, twice the level considered intoxicated under Wisconsin law.

"The term 'human being' was not intended to refer to an unborn child, and Deborah's prenatal conduct does not constitute attempted first-degree intentional homicide and first-degree reckless injury," the court ruled.

Zimmerman spent the day her daughter was born drinking at a bar, building a blood-alcohol level exceeding 0.30 percent at the time of birth.

At the hospital, Zimmerman allegedly told a nurse: "I'm just going to go home and keep drinking and drink myself to death, and I'm going to kill this thing because I don't want it anyways."

Zimmerman's baby was born limp and pallid. Zimmerman's lawyer, Sally Hoelzel, said the girl – now 3 years old and living in foster care – is healthy.

Zimmerman has yet to stand trial. She took her case to the appeals court after a trial-level judge refused to dismiss the charges. Zimmerman contended that her alcohol abuse during pregnancy was directed toward her own body and the fetus she carried – not another human being.

Authorities argued that Zimmerman should be prosecuted for attempted murder based on the state's "born alive" rule. The law says a person can be charged with murder if he or she harms a pregnant woman and her fetus is born alive and then dies. Prosecutors argued that the law

should be extended to attempted murder if a fetus is born with injuries but survives.

The appeals court ruled yesterday that was not the Legislature's intent.

Zimmerman has been in prison for violating her bail conditions in the case and is due for release in September.

Zimmerman's attorneys and civil libertarians had argued that if the state succeeded, women would risk criminal charges if they did anything – such as smoking or drinking – that could harm a fetus.

Simon Heller, litigation director for the Center for Reproductive Law and Policy, which handled Zimmerman's defense, said there have been many rulings that a fetus is not a human being, including the U.S. Supreme Court's Roe vs. Wade decision legalizing abortion.

The South Carolina Supreme Court, however, ruled that a viable fetus is a person under a statute punishing child abuse, he said. The court did not apply it to murder laws in that case.

APPENDIX C

CLARENCE F. MURPHY V. PLANNED PARENTHOOD OF GREATER IOWA, INC., ET AL.,
SCOTT COUNTY DISTRICT COURT NO. 94716:

FIRST AMENDED PETITION FOR A DECLARATORY JUDGMENT AND AN INJUNCTION TO PREVENT PLANNED PARENTHOOD'S USE OF LAND FOR THE OBNOXIOUS AND OFFENSIVE TRADE OF ABORTION AND INFANTICIDE IN VIOLATION OF: (1) PETITIONER MURPHY'S SUCCESSFUL STATUTORY PROTEST PURSUANT TO BETTENDORF ZONING CODE §24.2 AND §24.4; AND (2) PARAGRAPH 3 OF THE RECIPROCAL RESTRICTIVE AND PROTECTIVE COVENANTS THAT RUN WITH BOTH PETITIONER MURPHY'S LOT 3 OF BLOCK 4 AND THE ADJOINING LAND OF PLANNED PARENTHOOD TO THE SOUTH, WHICH LIES BETWEEN BLOCK 4 AND BLOCK 1 AND WITHIN THE QUAD CITY TECHNOLOGICAL CENTER, A PLANNED UNIT DEVELOPMENT (P.U.D. ZONE).

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 13, footnote 1,
..... Page 16, footnote 3,
..... Page 18, footnote 5,
..... Page 19, line 14.)

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

	)	**Case No. 94716**
Clarence F. Murphy,	)	
Plaintiff,	)	**First Amended Petition for a**
	)	**Declaratory Judgment and**
vs.	)	**an Injunction to Prevent**
	)	**Planned Parenthood's Use of**
Planned Parenthood of	)	**Land for the Obnoxious and**
Greater Iowa, Inc.	)	**Offensive Trade of Abortion**
Defendant,	)	**and Infanticide in Violation**
	)	**Of: (1) Petitioner Murphy's**
and	)	**Successful Statutory Protest**
	)	**Pursuant to Bettendorf**
The City of Bettendorf,	)	**Zoning Code §24.2 and**
Iowa	)	**§24.4; and (2) Paragraph 3**
Defendant,	)	**of the Reciprocal Restrictive**
	)	**and Protective Covenants**
and	)	**That Run with Both**
	)	**Petitioner Murphy's Lot 3 of**
Middle Road Investors, Inc.	)	**Block 4 and the Adjoining**
Defendant.	)	**Land of Planned Parenthood**
	)	**to the South, Which Lies**
		Between Block 4 and Block 1
		and Within the Quad City
		Technological Center, a
		Planned Unit Development
		(P.U.D. Zone).

COMES NOW Plaintiff, Clarence F. Murphy, and for his Petition for a Declaratory Judgment and Injunction, states as follows:

PARTIES

1. Petitioner Clarence F. Murphy and his wife Hwa Cha Murphy (hereinafter called "Petitioner Murphy" and "Murphy") are citizens of Bettendorf, Iowa, who reside at 2835 Willow Drive, Bettendorf, Iowa. Murphy and his wife are the owners of two twelve plex apartments known as 2655 Tech Drive, Bettendorf (a.k.a. Lot 3, of Block 4) and 2750 Tech Drive, Bettendorf (a.k.a Lot 2 of Block 2) of the Quad City Technological Center, a planned unit development and hold title to such properties in the name of Murpak Enterprises, Inc., a Delaware Corporation which is wholly owned by Murphy and his wife Hwa Cha.. See **Exhibit** pages **C-3** and **C-4**, infra.

2. Lot 3 of Block 4 was conveyed by Middle Road Investors, Inc. (hereinafter called "Defendant Middle Road" and "Middle Road") to Petitioner Murphy by Warranty Deed dated January 30, 1976, which was filed with the Office of Scott County Recorder on February 18, 1976 as Document 2524-76 (after the Iowa Supreme Court decision in ***Kuntz*** [infra, 1975] and ***Harris***, [infra, 1975]). Defendant Middle Road had acquired its ownership by Warranty Deed from the City of Bettendorf (hereinafter called "Defendant Bettendorf" and "Bettendorf") on the same date (February 18, 1976) in partial performance of a contract dated November 7, 1972 and recorded in the Office of Scott County Recorder as Document 1947-73. The abstract for the Plat of Lot 3 of Block 4, which is attached as **Exhibit A** and incorporated by reference herein, contains the following certification at page **A-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of

> Quad City Technological Center shall remain in effect and apply to Lot 3 of Block 4 as platted herein.
>
> " Dated this 20th day of January, 1976.
>
> MIDDLE ROAD INVESTORS, INC.
> By Robert D. Danico, President
> By C.J. Munson, Secretary
>
> CITY OF BETTENDORF, IOWA
> By William C. Glynn, Mayor
> By Margaret W. Lake, Deputy City Clerk"

3. Lot 2 of Block 2 was conveyed to Petitioner Murphy and his wife by Ed Speer Construction, Inc. by Warranty Deed dated February 25, 1994 and filed on March 4, 1994 in the Office of Scott County Recorder as Document No. 7001-94 in full performance on that real estate contract dated June 1, 1979 and recorded on January 23, 1980 in the Office of the Scott County Recorder as Document No. 1155-80. The abstract for the Plot of Lot 2 of Block 2 which is attached as **Exhibit B** and incorporated by reference herein shows that the Defendant Bettendorf was an owner with Middle Road of Block 2 and contains the following certification at page **B-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of Quad City Technological Center shall remain in effect and apply to Lot 2 as platted herein. In addition thereto, each lot owner of Lots in said Block 2 shall share the common driveways into said Block 2 from Tech Drive and P.U.D. Drive.

" Dated this 1st day of July, 1975.

MIDDLE ROAD INVESTORS, INC.
By Robert D. Danico, President
(Corporate Seal) By C.J. Munson, Secretary

CITY OF BETTENDORF, IOWA
By William C. Glynn, Mayor
(Seal of City of Bettendorf, Iowa)
By James W. Strieck, Clerk"

4. Defendant Planned Parenthood of Greater Iowa, Inc. (hereinafter called "Defendant Planned Parenthood" and "Planned Parenthood") is the present owner of a parcel of land within the metes and bounds of the Planned Unit Development (hereinafter "P.U.D. Zone") known as Quad City Technological Center to the City of Bettendorf, lying between Block 1 and Block 4, the Lot having been purchased by Defendant Planned Parenthood on April 14, 1997. The northern boundary of the Planned Parenthood property abuts and forms the southern boundary of Lot 1, Lot 2 and Lot 3 of Block 4. The southern boundary of the Planned Parenthood property abuts and forms the northern boundary of Block 1, and the northern boundary of the right of way know as Happy Joe Drive, as shown on the two maps which are attached to this Petition as **Exhibit C** and pleaded by incorporation herein. At the time of the platting of Lot 3 of Block 4, it was the expressed intention of Defendant Bettendorf and Defendant Middle Road, as the developers of the Quad City Technological Center to the City of Bettendorf, to place the same "restrictive" and "protective" covenants that were attached to Block 1 on the future development and platting of the P.U.D. Zoned Planned Parenthood property, which was owned in fee simple by Defendant Bettendorf and Defendant Middle Road, so that the "benefits" and "restrictions" on all of the said Lots in said land development were "reciprocal", as expressed and accomplished in the recording of the platting of Blocks 1 through 6 as a whole, see **Exhibit D** to this Petition (infra, at page **D-3**, the first paragraph and page **D-6**, paragraph

11) and pleaded by incorporation herein. Petitioner avers that the terms of the restrictive and protective covenants were extended by the developer, Defendant Middle Road, for a finite period of 10 years to the year 2003 to provide time to complete the platting of the plan as a whole, so that upon the completion of that land development, each of the lots within the P.U.D. Zone would have and enjoy the same benefits and burdens.

5. By the platting of Lot 3 of Block 4, Petitioner Murphy's property was burdened by the restrictive covenants but did not, at that time, receive the promised reciprocal benefits (the "protective" covenants) from the adjoining Planned Parenthood property the title to which, was thereafter "clouded" by the "equitable protective servitude" which attached to Murphy's land to the north. The "restrictive" and "protective" covenants in the platting of Lot 3, Block 4 are writings which establish a bilateral contract between Defendant Bettendorf and Defendant Middle Road as the developers and Murphy who, by virtue of his purchase of Lot 3, Block 4, joined in the unilateral agreement of Defendant Bettendorf and Defendant Middle Road, who owned the said "P.U.D. Zoned" Planned Parenthood land in fee simple in 1975.

6. The City of Bettendorf is named as a Defendant because of its participation with Middle Road in the draftsmanship and approval of Paragraphs 3 and 11 of the Restrictive (burden) and Protective (benefit) Covenants as noted above and in that part of the Abstract for the Final Plat of Block 1 (see **Exhibit A-2** and **A-3** and **Exhibit D** to this Petition at pages **D-1** through **D-11**) which reads in part as follows with respect to Paragraphs 3 and 11:

"RESTRICTIVE AND PROTECTIVE COVENANTS

" MIDDLE ROAD INVESTORS, INC., an Iowa Corporation, hereby establish and declare the following restrictive and protective covenants to be applicable to the following described real estate located in Scott

County, Iowa, to-wit: All lots in Blocks 1 through 6 of The Planned Unit Development known as Quad City Technological Research Center, to the City of Bettendorf, Iowa, which plat is recorded as Document No. 5134-73 in the office of the Recorder of Scott County, Iowa:

" 1. No building . . . .

" . . . .

" 3. No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the other lot owners in said addition.

" . . . .

" 11. These restrictions shall be in force from the date of the Owner's Certificate to which it is an exhibit until January 1, 1993 or until such later date to which the same may be extended as hereinafter provided, and shall run with and be binding upon all lots in said addition, and every part thereof and shall be appurtenant to and for the benefit of all said lot owners. These restrictions shall be automatically extended for an additional ten-year period on January 1, 1993, and each ten year anniversary of said date unless a written instrument signed and acknowledged by the owners of a majority of all the lots in Quad City Technological Center shall prior to such date or anniversary be recorded with the Recorder of Scott County, Iowa, abrogating or modifying the same in whole or in part to the extent therein set forth. In determining the majority of said lot owners, each lot shall be entitled to one vote to be cast according to the will of a majority in interest of any co-owners having interest therein whether such majority is represented by a majority of the undivided

interests in an entire lot or ownership of the greater portion of a subdivided lot. A contract purchaser or life tenant of the legal title shall be deemed the owner. In all other respects, ownership shall refer to record owner ship of legal title." (Our emphasis.)

" 11. Invalidity, abandonment or waiver of any one or more of the same restrictions shall in no wise affect any of the other restrictions, which shall remain in full force and effect.

" 12. In the event any person who may at any time own or occupy any of the numbered lots, or part thereof, in said Addition should violate or threaten to violate any of these restrictions, said Middle Road Investors, Inc. its successors and assigns, and the owners from time to time of any of the numbered lots in said Quad City Technological Center shall have the right to proceed in any court of law or equity, by injunction or otherwise, to enforce performance and restrain violation, or pursue any other remedy to which it or they may be entitled and shall have the right to collect from the party or parties violating or threatening to violate the same, either jointly or severally, all damages, costs, expenses and counsel fees resulting from the violation thereof, or incurred in, or in connection with, said proceedings.

"Dated at Bettendorf, Iowa, this 3rd day of April, 1973.

Middle Road Investors, Inc.
By: Robert D. Danico, President
(Corporate Seal) By: C.J. Munson, Secretary"

7. Thereafter, Middle Road did not plat Block 5 and 6 as planned. Instead, on June 16, 1976 (5 month after the conveyance of Lot 3, Block 4 to Murphy), Defendant Middle Road, without Notice to Murphy, conveyed the Planned Parenthood property by a Warranty Deed to "Robert Versman

and Rose Versman, husband and wife, as tenants in common, and to their heirs and assigns." The legal document conveying the real estate, contains an asterisk and the typed instruction reading "subject to restrictive covenants recorded as document 5134-73 S.C. Iowa Rec. Off." which is initialed by Robert D. Danico as President and C.J. Munson, as Secretary of Middle Road, Inc. (see Document 10830-76 at **Exhibit E** to this Petition).

8. 10 years later, on December 23, 1986, Robert H Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 25349-86, recorded on December 31, 1986, at **Exhibit F** to this Petition which contains the typed instruction reading: "Subject to: 1. Easements, covenants and restrictions of record.")

9. On December 24, 1986, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1735-87, recorded on January 28, 1987 at **Exhibit G** to this Petition which contains the typed instruction reading: "Subject To: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on December 23, 1986, . . . recorded in the Scott County Recorder's office as Document No. 25349-86 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto").

10. On January 3, 1987, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1736-87 recorded on January 28, 1987 at **Exhibit H** to this Petition which contains the typed instruction reading: "Subject to: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on Jan. 2, 1987 recorded in the Scott County Recorders office as Document 165-87 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto.")

11. On April 14, 1997, Kenneth J. Versman and Linda Jean Versman, Husband and Wife, Stuart J. Heller and Judith Lee Heller, Husband and Wife, and Frederick J. Glassman and Frances Belle Glassman, Husband and Wife, conveyed by Warranty Deed the Planned Parenthood property to Planned Parenthood of Greater Iowa, Inc. or Planned Parenthood of Greater Iowa Foundation, Inc. (See Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this

Petition (last in order).

PETITIONER MURPHY'S CONTENTIONS

12. An actual controversy has arisen between Petitioner Murphy and Defendants, relating to the legal rights and duties of Defendant Planned Parenthood and Defendant Bettendorf, in respect to said Lots as those rights and duties are affected by Paragraph 3 and Paragraph 11 of the above stated Restrictive (burden) and Protective (benefit) Covenants. Petitioner Murphy contends that Paragraph 11 must be construed against its co-author Defendant Bettendorf and read to extend the Restrictive and Protective Covenants automatically for an additional, finite ten-year period on January 1, 1993 to January 1, 2003 without reference to that language which appears after the "comma" which follows the date "January 1, 1993". It would appear that such "finite" language was adopted to keep the first additional 10-year period extension in compliance with the requirements of **Bettendorf Code §614.24** which was enacted in 1966 and was interpreted by the Iowa Supreme Court in ***Compiano v. Kuntz***, 226 N.W.2d 245 (Iowa 1975) and ***Presbytery of Southeast Iowa v. Harris***, 226 N.W.2d 232, 237-38, 242 (Iowa 1975). Because the "finite" 10-year extension period was accomplished during the first 21-year period and was a recorded document, it met the requirements of **Bettendorf Code §614.24**, which then read "unless the claimant shall, by himself, or by his attorney or agent . . . . Shall file a verified claim with the recorder of the county wherein such real estate is located within said twenty-one year period".

13. Defendant Bettendorf is a **Home Rule** City in the State of Iowa which is empowered to enact zoning ordinances (i.e., P.U.D. and C-5 Zones) and amendments (zone changes) on real property in the City of Bettendorf, acting by and through the Bettendorf City Council, and to act as "parens patria" on behalf of Petitioner Murphy and other Bettendorf residents

(citizens) in defense of their property rights under such zoning ordinances when such zoning rights of the City of Bettendorf are challenged by third parties in a Federal District Court in a Federal Civil Rights action pursuant to **42 U.S.C. §1983**.

14. Such zoning ordinances and zone changes are accomplished by a legislative act by the City Council to accomplish the same. Under the **Doctrine of Separation of Powers**, the general rule is that the Courts cannot write or rewrite the zoning laws, nor force the legislative body to enact or amend a zoning ordinance. An amendment which is adopted in disregard of the protest of property owners who are acting pursuant to a valid "protest" ordinance, is void. The City of Bettendorf is a necessary party in that a Federal Judgment of U.S. District Court Judge Charles R. Wolle in a Federal Civil Rights action brought by Defendant Planned Parenthood, purports to rezone the Planned Parenthood property (P.U.D. Zone to C-5 Zone). Under the **Doctrine of Separation of Powers**, the general rule is that a federal court has no power (lack of subject matter jurisdiction) to rezone real property in the City of Bettendorf, which function (zoning), under the U.S. Supreme Court decision in ***Huffman v. Pursue, Ltd.***, infra., must be held to be both a "municipal affair" and an "important state matter" which is protected by the **11th Amendment**.

15. Defendant Planned Parenthood wishes to construct a clinic in Bettendorf, Iowa which will cater to the "abortion" trade. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 zone. Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose to purchase a property in a P.U.D. Zone (which was surrounded by and within 200 feet of three relatively new residential apartment complexes on Lots 1, 2, and 3 of Block 4 which were benefitted by a **Bettendorf "Protest" Ordinance**) and submitted an application for a Zone Change by ordinance to C-5.

16. The adjacent apartment owners (see **Exhibit C–**

Murphy and Jecklin) and Larry Whitty, the owner of Lot 1, Block 1 objected and made a successful statutory protest (**20% Rule**) against the zone change (being within 200 feet of the Planned Parenthood property), pursuant to **Bettendorf Zoning Code §24.2** and **§24.4**, which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the zone change. The City Council on March 16, 1996, voted 5-1 not to adopt the C-5 Zoning ordinance.

17. Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The 8th Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983). Under Iowa case law, a City Council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by Writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If such an appeal is not filed within 30 days, the City Council's actions become final under Iowa law, in which case, under the **11th Amendment** and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman*** (***University of Tennessee v. Elliott***, 470 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 [1986], and ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 70 L.Ed.2d 56, 104 S.Ct. 892 [1984], and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8th 1995]), the City Council's quasi-judicial order also becomes final and ***Res Judicata*** under Federal law, because the federal courts are required to give this ***Res Judicata*** **Rule** the same interpretation given it by the state court.

18. On March 21, 1997, one year and two days after the City Council's denial of the zoning change, Defendant Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court (pleading what is, in essence, an appeal from the Bettendorf City Council's quasi-judicial Order denying the C-5 zoning Application). Planned

Parenthood did not name as defendants the adjacent apartment owners and Larry Whitty, who made the successful statutory protest.

19. The City of Bettendorf filed a Motion for a Partial Summary Judgment, pursuant to the **11th Amendment** and the ***Res Judicata*** **Doctrine**. U.S. District Judge Charles R. Wolle (egregiously) denied the city's ***Res Judicata*** Plea. Upon the conclusion of the Federal trial, Judge Wolle entered a judgment which purported to rezone the property to C-5 Zoning.

20. Petitioner Murphy timely moved to intervene (immediately after the City of Bettendorf announced its decision not to act as "***parens patria***" and pursue an appeal from the Judgment of U.S. District Court Judge Wolle), and within the appeal time period, for the purpose of appealing U.S. District Court Judge Wolle's Judgment on **11th Amendment** (lack of subject matter) jurisdictional and other grounds, including his denial of Bettendorf's Summary Judgement Motion on a plea of ***Res Judicata***.

21. U.S. District Court Judge Wolle ruled (cursorily and egregiously) on Petitioner Murphy's extensive pleadings: (1) that the Intervention Motion was "untimely", (2) refused to address the merits of Petitioner's right to mandatory intervention, and the **11th Amendment** Jurisdictional and ***Res Judicata*** issues raised by Murphy at the time of Murphy's Intervention Motion, and (3) further refused to set such matters for oral argument.

22. In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two separate forms: by the filing of a direct appeal and by the filing of a verified complaint in an original Petition for Writ of Mandamus in the 8th Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

23. In a highly unorthodox ruling, the Court of Appeals treated the Appellant's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus as though they had been consolidated, and in a brief single order, denied the Petition for Writ of Mandamus without an opinion and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals thereafter also denied a Petition for Rehearing and Suggestion for Rehearing En Banc in each of the two cases. The U.S. Supreme Court refused to issue its discretionary Writ of Certiorari to review such erroneous rulings.

24. Petitioner Murphy contends that the **11th Amendment** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control this litigation and that both of the Federal Courts were in error in their refusal to address the issue of "lack of subject matter jurisdiction" of the Federal Courts under the **11th Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998), at **Point III** (duty to address the questions of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S 139, 113 S.Ct. 684 (1993) (creating a new **Rule of Court** re the issue "lack of subject matter jurisdiction"), ***Wisconsin Dept. of Correction v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, 118 S.Ct. ___, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. District Court***, 426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119 (1976); ***Will v. U.S.***, 389 U.S 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967); and **Supreme Court Practice**, 7th Ed., Stern, Gressman Shapiro, Geller, at page 495.

25. Plaintiff Murphy further contends: (1) that he is entitled to a Declaratory Judgment in the District Court of Iowa which holds that, under Iowa Law, the Bettendorf City

Council's action on the above zone change is a "judicial" function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted; (2) that the record shows that the adjacent apartment owners made a successful statutory protest which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the Zone Change, and that the City Council on March 19, 1996 voted 5-1 not to adopt the C-5 Zoning Ordinance; (3) that pursuant to such successful protest, the adjacent apartment owners acquired "**vested rights**" in the City Council's Final Order (judgment); and (4) that the City Council's final order which denied the C-5 Zoning Application was and is a final judgment which, under Iowa law and the **Constitutional Doctrine of *Res Judicata*** was and is entitled to recognition by the U.S. District Court, the 8TH Circuit Court of Appeals and the U.S. Supreme Court.

26. Murphy believes and avers that the Bettendorf City Attorney, Greg Jaeger, will acknowledge on behalf of the Defendant Bettendorf: (1) that the adjacent property owners did make a successful protest under the **Bettendorf "Protest" Ordinance**, which reads as follows:

> "24.4 In case the commission does not approve the proposal or in case of a protest against such change signed by twenty (20) percent or more of one or more of the following groups:
>
> " (a) Property owners of the lots included in such proposed change.
>
> " (b) Property owners immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" (c) Property owners immediately adjacent in the front thereof extending the depth of one lot or not to exceed two (200) feet therefrom (excluding street right-of-way).

" (d) Property owners immediately adjacent to any and all sides (including the front and rear sides) of the proposed change extending one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" Such amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all the members of council.";

(2) that the **"Protest" Ordinance** is constitutionally valid and was validly applied; and (3) that the **Doctrine of *Res Judicata*** as pleaded by Defendant Bettendorf in the Federal Civil Rights lawsuit did, in fact, require that the Civil Rights action which was filed in the U.S. District Court be dismissed for lack of subject matter jurisdiction under the **11th Amendment** and ***Huffman***, supra.

27. Murphy further avers that, upon the successful termination of the Declaratory Judgment proceedings before this Court, Plaintiff intends to file a Declaratory Judgment Action in the U.S. District Court to have Judge Wolle's Judgment vacated on the ground that the Federal District Court lacked **Article 3, §2** subject matter jurisdiction under the **11th Amendment**, and the U.S. Supreme Court's ***Huffman*** **Abstention Doctrine**, ***Rooker-Feldman*** **Abstention Doctrine**, ***Res Judicata*** **Doctrine**, and the ***Stare Decisis*** **Doctrine**, and for other reasons which have been made of record in the U.S. District Court, the U.S. Court of Appeals for the 8th Circuit, and the U.S. Supreme Court; and if necessary, will petition the U.S. Supreme Court for a Writ of Certiorari on the **11th Amendment** issue and

Substantial Federal Questions which have been presented to the U.S. Supreme Court by the conflict in the determination of this issue by the State of Iowa and Federal Judiciary. See, in this regard, the copy of the pleadings on file in the U.S. Court of Appeals for the 8th Circuit and in the U.S. Supreme Court which are being lodged concurrently with the Clerk of this Court by Petitioner Murphy.

28. No other adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined; in that (1) U.S. District Court Judge Wolle has egregiously (willfully, knowingly and wrongfully) denied Petitioner Murphy's lawful right to intervene in the Federal Civil Rights action of Defendant Planned Parenthood, as an indispensable party; in order that he might appeal the (egregiously) erroneous judgment of Judge Wolle which created the opportunity for Planned Parenthood to engage in a course of conduct which constitutes a breach of **Bettendorf Zoning Code §24.2** and **§24.4** and Paragraph 3 of the Restrictive and Protective Covenants; (2) the Court of Appeals for the 8th Circuit refused to entertain Petitioner Murphy's appeal from Judge Wolle's erroneous judgment and a Petition for Writ of Mandate; and (3) the U.S. Supreme Court refused to exercise its discretionary review of the Federal Court record by Writ of Certiorari. Because Murphy was wrongfully denied the right to intervene in the Federal Civil Rights lawsuit, he is not bound by Judge Wolle's Judgment in the Civil Rights action under the **Doctrine of *Res Judicata***; see ***International Union v. Scofield*** 382 U.S. 205, 15 L.Ed.2d 272 (1965).

29. Murphy avers and contends that the Restrictive and Protective Covenants which were established by the Defendant Middle Road Investors, Inc. on April 3, 1973 at the time of the platting of Block 1 (see Petition at **Exhibit D-1** through **D-11**) and re-established and confirmed by the Defendant Middle Road Investors, Inc. on January 20, 1976 as the owner and proprietor of Lot 3 of Block 4, as set forth at **Exhibit A-2** and **A-3** to this Petition, run with the land and were

fully operational and binding on all parties during the period January 20, 1976 through January 1, 1993; and on that date were automatically extended for an additional ten year period from January 1, 1993 through January 1, 2003 by the provision of paragraph 11 of the Restrictive and Protective Covenants (see **Exhibit D-6** and **D-7**) and were and are presently operative and binding on all parties, including the Defendant Planned Parenthood of Greater Iowa, Inc. from and after April 14, 1997, when Planned Parenthood received title to such property by Warranty Deed from Kenneth J. Versman, etc. (see Petition at paragraph 11 on page 6 of the Petition and Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this Petition [last in order]).

30. Defendant Planned Parenthood's projected use of such property in the face of the successful protest of the Bettendorf residents adjoining such property under **Bettendorf "Protest" Zoning Code §24.2** and **§24.4** constitutes an immediate and continuing breach of Paragraph 3 of the Restrictive and Protective Covenants which requires that "No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be, or become, an annoyance or nuisance to the other lot owners in said addition." (Our emphasis.)

31. Petitioner has no adequate remedy at law to compensate for the harm to the reputation and contemporary community standards of the City of Bettendorf, Iowa which flows from the knowledge of the general public that land in Bettendorf, Iowa, a Home Rule City, which is adjacent and within 200 feet of an existing residential neighborhood is being used for the conduct of early abortions, late term abortions, and partial birth abortions also known and referred to as "infanticide". Under these facts and circumstances, and upon this record, Defendant Planned Parenthood must be held to be engaged in a trade which is "obnoxious" and "offensive" as a matter of law under the terms of paragraph 3 of the Restrictive and Protective Covenants (see **Exhibit D-5** to this Petition); and

is both a public and private nuisance under the **English Common Law**, the early **American Common Law**, the **Statutes of the State of Iowa** and the **"Protest" Zoning Code, §24.2** and **§24.4** of the City of Bettendorf. The Defendant's continuous breach of said Covenant and maintenance of a public and private nuisance will result in irreparable harm to the value of Petitioner's land and the pecuniary amount of such damage, which is impossible to ascertain, warrants the issuance of a preliminary injunction.

QUESTIONS PRESENTED FOR THE IOWA DISTRICT COURT ON THIS PETITION FOR A DECLARATORY JUDGMENT.

1. Whether **Bettendorf Zoning Code §24.2** and **§24.4** are constitutional on their face?

2. Whether the order of the Bettendorf City Council which denied the Planned Parenthood Zone Change Application from P.U.D. to C-5 zoning by a 5-1 vote is ***Res Judicata*** under Iowa law because Planned Parenthood did not timely appeal such order to the Iowa District Court by Writ of Certiorari?

3. Whether that part of the record which shows that three of the adjacent property owners (Clarence Murphy [Petitioner], owner of Lot 3, Block 4, Lois Jecklin, owner of Lots 1 and 2 of Block 4, and Larry Whitty, owner of Lot 1, Block 1) made a successful statutory protest under **Bettendorf Zoning Code §24.2** and **§24.4**, mandates a ruling by this Court that the zoning on the Planned Parenthood property under Iowa law is "P.U.D." and remains as "P.U.D."?

CONCLUSION

The complex propositions of Iowa Zoning law which are framed by this Petition provide irrefutable, positive proof:

(1) that legal issues involving the zoning laws of a state are "important state matters" which are protected by the **11th Amendment** and the ***Huffman*** **Abstention Doctrine**, and (2) that a U.S. District Judge lacks "subject matter jurisdiction" of such issues which, according to the laws of probability, will be decided differently for each state based upon the Judicial Policy of the state which is affected. The U.S. Supreme Court has held in the ***Huffman*** cases that, pursuant to the ***Res Judicata*** **Doctrine**, the U.S. District Court must extend to such State Court judgments the interpretation given by the State Court Judiciary (the equivalent of the "**Full Faith and Credit**" provision of the **Federal Constitution** which governs the responsibility of the Judiciary of State Courts to acknowledge the judgments of the Judiciary of other State Courts).

WHEREFORE, Petitioner prays that judgment be entered against the Defendants:

1. For a Declaration, pursuant to Iowa Law, that the Bettendorf City Council's action on Planned Parenthood's Zone Change Application from PUD to C-5 Zoning is a judicial function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted on such Application; that the record shows that the **"Protest" Ordinance** is constitutional and was applied in a constitutional manner; that pursuant to said successful protest, the adjacent property owners acquired "**vested rights**" in the City Council's Final Order (judgment); that the City Council's denial of the C-5 Zoning Application, under the constitutional **Doctrine of *Res Judicata*** is a Final Judgment and that the Zoning on the Planned Parenthood property under Iowa law is "P.U.D." as enacted by the Bettendorf City Council.

2. That during the pendency of this action, a preliminary injunction issue to enjoin and restrain the Defendant Planned Parenthood from the acts and conduct aforesaid.

3. That the Defendant Planned Parenthood be restrained and enjoined from violating and continuing to violate and breach **Bettendorf "Protest" Ordinance §24.2** and **§24.4** and Paragraph 3 of the Protective Covenants that runs with Lot 3 of Block 4 during the time the same is to remain in force and effect;

4. For costs, and attorneys fees and other relief as provided above; and

5. For such other and further relief as the Court may deem proper.

DATED: January ___, 2000

Respectfully submitted,

_____

Clarence J. Murphy, Plaintiff

VERIFICATION

State of California)
} SS:
Los Angeles County)

Declaration under Penalty of Perjury, Pursuant To California Code of Civil Procedure §2015.5

I am the attorney for Plaintiff Clarence J. Murphy and as such attorney, the facts as pleaded in the above Petition are more fully known to me. I therefore make this Declaration and declare under penalty of perjury under the laws of California that the forgoing **First Amended Petition for a Declaratory Judgment and an Injunction** is true and correct.

Dated: January 31, 2000
Location: 9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221

/S/

James J. Clancy, California Bar No. 26946
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221
(818) 352-2069 Fax: (818) 352-6549

Attorney for Petitioner Clarence J. Murphy

APPENDIX D

LAW ENFORCEMENT *MEMORANDUM* OF AMICUS CURIAE JAMES J. CLANCY, DATED NOVEMBER 24, 1999, DOCUMENTING PAST HISTORICAL EVENTS, DISASTROUS RESULTS, CONFUSION AND SERIOUS DETRIMENT SUFFERED BY THE GENERAL PUBLIC AS A RESULT OF THE INTERFERENCE OF THE FEDERAL COURTS WITH THE 10TH AND 11TH AMENDMENT SOVEREIGN POWER OF THE INDIVIDUAL STATES TO REGULATE THE COMMERCIAL SALE, DISTRIBUTION, ETC., OF HARD-CORE PORNOGRAPHY BY CLOSURE OF THE PREMISES AS A COMMON LAW PUBLIC NUISANCE, AS EXEMPLIFIED BY THE U.S. SUPREME COURT'S DECISION IN *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592, 43 L.ED.2D 482, 95 S.CT. 1200 (1975), REH. DEN., 421 U.S. 971, 44 L.ED.2D 463, 95 S.CT. 1969.

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 14, lines 12-13,
..... Page 18, footnote 4,
..... Page 24, line 24,
..... Page 25, lines 4, 8.)

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November 24, 1999

MEMORANDUM

SUBJECT:

1. ***Los Angeles Times*** news article, dated September 1, 1999, with headline reading "L.A. Economy's Dirty Secret: Porn Is Thriving"; and

2. Mayor Richard Reardon's response to the press that he "wishes the industry was headquartered somewhere else" and that he is "ashamed of the porno industry".

3. **(a)** The use of Orange County Superior Court Exhibits (records) in the form of autoptical proferences (time and motion studies of pornographic films to establish visual proof of Justice Potter Stewart's "phenomenon" [1/] that one knows hard-core pornography when he sees it), and **(b)** the use of 11 years of public nuisance abatement adjudications in Santa Ana (1975-1986) (pursuant to which such pornographic films were declared to be hard-core pornography and enjoined by Order of Court) to prove, by example and similitude, the existence of identical moral public nuisances and unlawful business practices in the San Fernando Valley, ***(Excised Line)***.

[1/] Phenomenon is defined in Webster's Collegiate Dictionary, 5TH Edition, as "any object known through the senses rather than thought or intuition; specifically with Kant, the object of experience.

4. My contention that "closure" is mandated where the visual evidence which is offered is in the form of autoptical proferences; i.e., time and motion studies of films which provide irrefutable proof of hard-core pornography as the sole stock in trade, which is both a common law public nuisance under ***People ex rel. Busch v. Projection Room Theater***, 16 Cal.3d 350 [Mar. 4, 1976], as modified in 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 [June 1, 1976] and a statutory unlawful business practice under **Business and Profession Code §17200** and ***People v. E.W.A.P., Inc.***, 106 Cal.App.3d 315, 165 Cal.Rptr. 73 (CA2, dv5, 5-29-80) (hearing denied by Cal. Sup. Ct. on Aug. 21, 1980) which can be terminated by a lawsuit brought "by any person acting for the interests of itself, its members or the general public" (my emphasis). **Business and Professions Code §17.204**.

Pursuant to our phone conversation on October 28, 1999, I am personally delivering this Memorandum with its supporting documents, which will corroborate my representations in our September 1, 1999 and October 28, 1999 phone conversations that the present operations of the producers and distributers of "Porno" films and videotapes in the San Fernando Valley can be stopped through legal process.

Both the September 1, 1999 ***Los Angeles Times*** news article (see copy at **Exhibit A** to this Memorandum) and Mayor Reardon's remarks acknowledge that the production and distribution of obscene motion picture films and videotapes is rampant in the City of Los Angeles. The Mayor's remarks imply that there is nothing that the Mayor can do to stop that activity. I do not agree. The Orange County Superior Court records as to the number of injunctions which were issued in 11 years of Public Nuisance Abatement litigation, establish that the contrary proposition is true.

Upon reading the September 1, 1999 ***Los Angeles***

Times news article, I immediately picked up the phone and called to see if it would be possible for you to "access" the Mayor and alert him to the facts **(1)** that he has not been fully advised; and **(2)** that the production and distribution of such pornographic films can be stopped by the use of legal process by any person, pursuant to the **Business and Professions Code**. I stated that if a foundation grant were made available for such purposes, I could, within a relatively short period, prepare and submit a comprehensive study and report ***(Excised Line)*** based upon my 11 years of personal experiences with litigation in Santa Ana, with full documentation by way of autoptical proferences; that is, time and motion studies", which would establish: **(1)** that the production and distribution of such pornographic films and videotapes, identical to those in the litigation in Santa Ana, is both an unlawful business practice and a public nuisance in Los Angeles, and **(2)** that such unlawful business can now be closed down by an Equity Decree under the **Federal Constitution** pursuant to the **11TH Amendment** Sovereign Powers of State Judiciaries to act upon important State matters, and that the proposed Study would outline the steps that need to be taken in the Courtroom to achieve that objective.

(Excised Paragraphs [2][suggested remedy]).

As background, I performed legal services for the City Council of Santa Ana during the 11 year period 1975-1986 in a monumental effort by the City of Santa Ana to close the Mitchell Brothers' Santa Ana Theatre in Honer Plaza (formerly a United Artist's Family Theater) as a moral public nuisance. Unfortunately, at that time, the membership of the U.S. Supreme Court was badly "fragmented" and it was impossible to get the members of the High Court to note jurisdiction and rule on the constitutionality of the "closure" issue. I believe that had we been able to "force" a ruling out of the U.S. Supreme Court, we would have been able to achieve our Orange County objective in Santa Ana and close the Theatre, based upon past illegal conduct, and the problems that

exist today would not have developed.

In the interim 13 years, the balance of power on the High Court has shifted, and that objective can now be achieved, due to the new interpretation recently given to the **11TH Amendment** powers by a majority of five members on the present Court (Rhenquist, Kennedy, Scalia, Thomas and O'Connor) regarding "state sovereignty" and the subject matter jurisdiction of the state judiciary as to important state matters pursuant to the **11TH Amendment**. The recent interest in the **11TH Amendment** as a viable theory regarding state power, gives states new latitude in crafting, and implementing innovative solutions to state law enforcement problems.

In the first four years, (Sep. 1975 - Jun. 21, 1979) of our eleven year Santa Ana operations (1975-1986), the City of Santa Ana surveilled two pornographic films each week and did a comprehensive analysis of the same by the construction of "time and motion studies" and "continuities", as evidence in the form of "autoptical proferences". A list of those films which were named in four public nuisance abatement lawsuits is enclosed with this memo as an appendix to my Status Report to the Santa Ana City Attorney, dated October 28, 1982. See, also, my Status Report to the Santa Ana City Attorney, dated March 24, 1980, at page 5, which identifies four public nuisance abatement lawsuits and the number of pornographic films in each lawsuit as follows:

Lawsuit	Case No.	Period Covered
(Gow I)	25-65-30 (filed Nov. 2, 1976)	October 1975 - April 13, 1977 (24 Programs, 48 films)

Lawsuit	Case No.	Period Covered
(Gow II)	28-12-14 (filed Dec. 20, 1977)	April 13, 1977 - October 19, 1977 (12 Programs, 24 films)

(Gow III)	29-91-83 (filed Oct. 3, 1978)	July 15, 1978 - November 2, 1978 (13 Programs, 26 films)
(Gow IV)	31-55-93 (filed June 21, 1979)	November 2, 1978 - January, 1979 and April, 1979 - August, 1979 (23 Programs, 42 films)

144 Films

The Courtroom litigation during the period 1976-1979 described above involved the defense of one Federal copyright and one Federal Civil Rights lawsuit, and the prosecution of four State Court Public Nuisance Abatement lawsuits in which all 144 pornographic films were adjudicated at hearings on Motions for Preliminary Injunction, to be hard-core pornography and enjoined by the Orange County Superior Court as Common Law Public Nuisances, in violation of the California Obscenity Statutes. Those Superior Court deliberations were affirmed by the Court of Appeal and review was denied by the California Supreme Court. To this date, those adjudications have not been reversed. See, in this regard, the two bound volumes which are enclosed containing copies of the following Eight (8) Status Reports to the Santa Ana City Attorney dated:

April 24, 1979; December 14, 1979; March 24, 1980; May 12, 1980; December 12, 1980; December 31, 1981; October 28, 1982; and June 23, 1986; and other letters.

Thirteen (13) years later, resistance to the dissemination of such hard-core pornographic videotapes has virtually collapsed. I am enclosing a copy of a pornographic publication (3/4" thick, containing 350 pages), which is published every January and distributed by the Porno Industry in Los Angeles and elsewhere in the U.S., under the title "Adult Video News" (A.V.N.) and "Adult Entertainment Guide", "broadcasting" the

hard-core pornographic film titles which are now available in Los Angeles, the identity of the L.A. Producers, and Distributors of such pornographic films, the names of the actors and actresses and the nature of the hard-core pornographic content.

The remarkable part of this change in law enforcement efforts is that almost everyone of the pornographic films which were surveilled in Santa Ana during that 11-year period is named in the A.V.N. Adult Entertainment Guide. See and compare, in this regard, the titles listed in my Status Report to the Santa Ana City Attorney, dated October 28, 1982 (at "Appendix H"), and pages 204-207 of the A.V.N. Adult Entertainment Guide, listing the video titles of the hard-core pornographic "classics" which are available, with a check mark as to those titles which were exhibited and surveilled at the Mitchell Brothers' Theatre during the period October, 1975 - August, 1979 (see copy at **Exhibit B** to this Memorandum), which were the subjects of the Public Nuisance Abatement lawsuits known as Gow I, Gow II, Gow III and Gow IV and enjoined by the Orange County Superior Court as unlawful hard-core pornography, and upheld by the California Court of Appeal and California Supreme Court !

The magazine itself is pornographic. Further, all of the pornographic films listed therein which were held to be hard-core pornography by the Orange County Superior Court are products of an unlawful business practice and subject to abatement in Los Angeles County as public nuisances as a matter of law. To reach this conclusion , ***(Excised Words)*** need only examine the "autoptical proference" (time and motion study) for each of such films which is under challenge. The City of Santa Ana would not have been able to continue to maintain such lawsuits in the California Courts for 11 successive years without the "time and motion" studies to rely upon, and keep the City of Santa Ana in the courtroom. Such "autoptical proferences" are irrefutable.

I am transmitting two bound volumes of my correspondence and status reports to the Santa Ana City Attorney for the year 1979 and the years 1980 through 1986, on the progress of the Santa Ana lawsuits, containing my analysis of **(1)** the results achieved in the State and Federal Courts as to each of the above pornographic films and videotapes; **(2)** the nuisance abatement process (which was upheld by the California Supreme Court in ***People ex rel. Busch v. Projection Room Theater***, supra) (see copy at **Exhibit C** to this Memorandum); **(3)** the use of that process by seven other States (Washington, Ohio, Idaho, Georgia, Alabama, Texas and North Carolina); and **(4)** the news accounts of the closing down of the Exxxtasy and Tuxedo Channels on Satellite T.V. by Montgomery, Alabama District Attorney Jimmy Evans in December, 1990, using the "time and motion" and "continuity" studies which our operations prepared in Los Angeles with respect to the pornographic films (which included "The Opening of Misty Beethoven") which were exhibited by the Exxxtasy and Tuxedo Channels via Satellite and broadcast to Montgomery, Alabama and Los Angeles, California, simultaneously (see copy of the correspondence and news accounts of the demise of the Exxxtasy and Tuxedo Channels at **Exhibit D** to this Memorandum).

Each of the pornographic films which were named in those Santa Ana lawsuits was supported by a "time and motion study" which was examined by the City Council Members prior to their voting to authorize a public nuisance abatement lawsuit to be filed on such films. See my letter to the City Attorney, dated May 11, 1979. This was the "key" to our success in the Courtroom. The use of the "time and motion study", as autoptical evidence ("I know it when I see it" "phenomenon"—with no need to apply a definition and the "reasoning" mind) precluded the Mitchell Brothers from making the obscenity definition an issue or turning the lawsuit into a semantical debate. The Mitchell Brothers candidly admitted in their depositions that they produced and exhibited only hard-core pornography. It would have been impossible for them to argue

a plausible contrary proposition or come to a plausible contrary conclusion. For obvious reasons, no injunction was sought by the City of Santa Ana prior to a judicial determination on the merits.

Regretfully, on November 30, 1981, the U.S. Supreme Court refused to grant a hearing on the "closure" issue we had drawn in our primary lawsuit (Gow I). That issue was squarely before the High Court twice on the Santa Ana City ***Petitions for a Writ of Certiorari*** in Case No. 81-271 and Case No. 82-345 (see copy of "Reasons for Granting Review" in 82-345 at **Exhibit E** to this Memorandum). It took that long (5 years) to frame the "closure" issue at trial and get Case No. 81-271 before the High Court on appeal. We did this by getting the Trial Judge to make a finding of fact that he would have closed down the Theatre because of the contents being exhibited (which he described in detail) if the Constitution permitted him to do so under the U.S. Supreme Court decisions. See Status Reports, dated December 31, 1981, at pages 3-4, and October 28, 1982 at pages 1-2. Instead of ruling on the "closure" issue in Case No. 81-271, the U.S. Supreme Court reversed on the burden of proof issue summarily and without briefing or oral arguments, holding that in a civil case, the Equity"clear and convincing" burden of proof was satisfactory, and that the criminal standard of "beyond a reasonable doubt" was not applicable. This posed a real problem for Santa Ana, because the California Supreme Court in ***People ex rel. Busch v. Projection Room Theater***, supra, had refused to consider the "closure" issue on appeal, absent a decision from the U.S. Supreme Court on the "closure" issue. See Associate Justice Clark, concurring and dissenting in ***People ex rel Busch***, 17 Cal.3d 42 at page 62 (see copy of the ***Busch*** decision at **Exhibit C** to this Memorandum).

In the meantime, a coordinated effort was made to get the "closure" issue before the High Court in one of the seven other State cases, which were pursuing the same remedy (Washington, Ohio, Idaho, Georgia, Alabama, Texas and North

Carolina). Those efforts were also unsuccessful.

In ***State of Idaho, ex rel. Kidwell, Attorney General and Leroy, Ada County Prosecuting Attorney v. U.S. Marketing, Inc., et al.***, ___ Idaho ___, 631 P.2d 622 (March 29, 1981), the Idaho Supreme Court reversed the trial court and held that closure was constitutional and authorized the award of attorney fees (see copy of ***State of Idaho, ex rel. Kidwell and Leroy*** at **Exhibit C** to this Memorandum). Upon appeal, the U.S. Supreme Court first noted jurisdiction of those issues, and then vacated that ruling when ***U.S. Marketing, Inc, et al.*** withdrew its appeal voluntarily so as not to have the High Court rule on and uphold the closure issue. ***U.S. Marketing, Inc, et al.*** was ordered to do so by the suppliers who did not want a ruling on that issue. See Status Report, dated December 31, 1981. See also, pages 32-65 at page 36 of the ***Petition for Writ of Certiorari*** in ***Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theatre, et al.***, No. 82-345, October Term, 1982, which is attached to this Memorandum as **Exhibit E**.

The State case (on lack of subject matter jurisdiction) that came closest to solving Santa Ana's problem with the closure issue (***Carol Vance, et al. v. Universal Amusement Company, Inc., et al.***, No. 78-1588, U.S. Supreme Court, 1978 October Term, 455 U.S. 308 (1978) (involving state sovereignty, the **11TH Amendment** right of the state judiciary to apply the state statute to important state matters, and the issue of the Federal District Court's "lack of subject matter jurisdiction) was lost by a 5 to 4 decision when Texas Deputy Attorney General Lonny Zwiener gave the wrong answer to Associate Justice Stevens' questioning during oral argument. See my letter to Lonnie Zwiener, dated March 24, 1980. The City of Santa Ana filed an ***Amicus Curiae*** Brief in which it argued that the State of Texas had the right to exclude federal jurisdiction, pending a definitive ruling by the State High Court on the Texas Public Nuisance Statute. During oral argument, Deputy Attorney General Zwiener, without understanding the

consequences, innocently volunteered an incorrect statement that the State of Texas did, in fact, employ an interpretation that Justice Stevens felt was flawed. This error at oral argument cost the State the loss of Justice Stevens as a fifth vote, and the High Court's ruling upon the merits of the case, because Zwiener's "concession" during oral argument (which was not a part of the record), in effect, conceded "jurisdiction" and scuttled Santa Ana's ***Amicus Curiae*** argument and claim that the Courts of the State of Texas had not yet ruled definitively on such matters. The State of Texas Petitions had not raised or relied upon the "lack of subject matter" jurisdiction defense, but the Santa Ana ***Amicus*** brief had made it a defense which I was to argue, had Texas been able to arrange time for ***Amicus Curiae*** to argue. The High Court, however, denied Zweiner's motion that he be allowed to split his argument.

After ***Vance***, supra, it became apparent that the "closure" issue would not be ruled upon by the U.S. Supreme Court, absent a second appeal by Santa Ana in one of its later cases (which would have taken years to get the "closure" issue back to the High Court). The City of Santa Ana changed its procedure and started filing a separate action for each new weekly program. This also failed because the Presiding Judge would not give such trials the necessary "priority" and assign a courtroom to try the final injunction issue on a weekly basis. See Status Report to the Santa Ana City Attorney, dated June 23, 1986, at pages 1-6.

Because the High Court would not rule on the "closure" issue and the Santa Ana Superior Court would not assign a Court to try each case weekly on the final injunction, City Attorney Ed Cooper (who had replaced City Attorney Gow) abandoned the courtroom attempt to close down the Theatre by legal action in the courtroom and recommended it be done by eminent domain, incident to a plan of the City to upgrade the area by redevelopment.

In retrospect, it is now apparent that had Assistant

Deputy Attorney General Lonny Zweiner argued the "lack of subject matter jurisdiction" in 1982, the ***Vance*** case would have been decided differently and the "closure" issue could have been "forced" upon the U.S. Supreme Court for adjudication in the City's second ***Petition for Writ of Certiorari*** in No. 82-345, which was filed on August 24, 1982.

Today, because of the change in membership of the High Court, and the adoption of a new Court Rule in ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 506 U.S. 139, 121 L.Ed.2d 605, 113 S.Ct. 684 (1993) (which permits the **11TH Amendment** issue of "lack of subject matter jurisdiction" of the Federal District Court to be addressed at the commencement of the lawsuit in a pre-trial interlocutory appeal), the defect in the Santa Ana procedures can now be avoided. All that need be done is to apply for "closure" under the public nuisance abatement statutes and, assuming that the defendants remove that issue to the Federal District Court or that they file a Civil Rights action in the Federal District Court based upon the closure remedy, to immediately take an interlocutory appeal (pursuant to ***Puerto Rico Aqueduct and Sewer Authority***, supra, with respect to the federal interference, and the **11TH Amendment**) on the "closure" issue up to the U.S. Supreme Court.

(Excised Paragraph [suggested remedy]).

(Excised lines [suggested remedy]). My Status Report letters to the Santa Ana City Attorney are sequential, comprehensive, "instructive" and accurately state my position which is as valid now as it was in 1979. ***(Excised lines [suggested remedy])***.

(Excised Paragraphs [2] [suggested remedy]).

Inclusion of both the text of my letters and the synopsis "style" have special purposes. Both provide a different degree of proof, each of which is needed to forestall the customary

defensive "red herring" arguments and to maximize the probability that the judgment against the Porn Industry will prevail (buttressed by the use of a fully comprehensive report and autoptical evidence to "authenticate" the "summarized" statements of the law").

The federal court's "lack of subject matter jurisdiction" issue under the **11TH Amendment** which I attempted to get Lonny Zweiner to address as his primary issue, is at the very heart of this solution. No one understands that issue and its sand traps and pitfalls as I do, because of my 25 years of involvement with the **11TH Amendment** issue in the intervening years which have followed the argument in the U.S. Supreme Court in ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969.

In my 1979-1980 letters I suggested that we are really involved in a "moral Dunkirk" of our own making. Support for that "concept" can be found in the November 10, 1999 ***L.A. Times*** news article, a copy of which is attached to this letter at **Exhibit A**, involving the staging of a Pornographic "Trade Show" in 1998 at Cal State Northridge.

I am unwilling to admit that our Judaeo-Christian community standards cannot be "recaptured" and "reinstated". All that need be done is for enough of the "good" people to do that which is needed to restore what is the absolute "truth" under the Natural Law, and to require that the necessary adjustment be made to the law which, presently, is grossly misinterpreted and misunderstood by our "younger generation".

APPENDIX E

OPINION OF CHIEF JUSTICE WARREN BURGER, WITH WHOM JUSTICE POWELL AND JUSTICE REHNQUIST JOIN, DISSENTING IN *BROCKETT V. SPOKANE ARCADES, INC.*, NO. 80-1604, 454 U.S. 1022, 70 L.ED.2D 468, 102 S.CT. 557 (1981).

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 26, line 4.)

MEMORANDUM CASES

No. 80-1604. Donald C. Brockett, etc., Appellant v Spokane Arcades, Inc., et al.

454 US 1022, 70 L Ed 2d 468, 102 S Ct 557.

November 9, 1981. Appeal from the United States Court of Appeals for the Ninth Circuit. The judgment is affirmed. Dissenting opinion by the Chief Justice with whom Justice Powell and Justice Rehnquist join.

Same case below, 631 F2d 135.

Chief Justice Burger, with whom Justice Powell and Justice Rehnquist join, dissenting.

The Court today affirms a decision of the Court of Appeals holding unconstitutional a Washington statute which has yet either to be enforced in or construed by a Washington state court. I would abstain from decision until the Washington courts are given an opportunity to interpret the law which has been thus invalidated. This Court—and all federal courts—have enough to do without "pre-empting" state courts on matters initially of state concern.

The Washington "moral nuisance" law, Wash Rev Code § 7.48.050 et seq. (Supp 1977) —a comprehensive statute directed at prohibiting the public sale and exhibition of obscene materials—was adopted as an initiative by the voters in the November 8, 1977, election. Before the statute was even certified by the Secretary of State, appellees, several corporations engaged in the exhibition, distribution, and sale of movies, books, and magazines, filed this action in the Federal District Court. On February 6, 1978, less than three months after the initiative's adoption, and apparently before it had ever been applied, the District Court declared the law unconstitutional. 449 F Supp 1145.

I have previously outlined the concerns that should lead a federal court to stay its hand in cases such as this, when litigants have deliberately avoided resort to the courts of the state whose statute is being challenged. Vance v Universal Amusement Co. 445 US 308, 317-320, 63 L Ed 2d 413, 100 S Ct 1156 (1980) (Burger, C. J., dissenting); cf. Moore v East Cleveland, 431 US 494, 521-531, 52 L Ed 2d 531, 97 S Ct 1932 (1977) (Burger, C. J., dissenting); Wisconsin v Constantineau, 400 US 433, 439-443, 27 L Ed 2d 515, 91 S Ct 507 (1971) (Burger, C. J., dissenting). The policies of federalism and comity militate in favor of affording state judges—who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so—the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would. Harrison v NAACP, 360 US 167, 3 L Ed 2d 1152, 79 S Ct 1025 (1959); City of Meridian v Southern Bell Tel. & Tel. Co. 358 US 639, 3 L Ed 2d 562, 79 S Ct 455 (1959); Railroad Comm'n v Pullman Co. 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941).

Here, the Court of Appeals invalidated portions of the nuisance law dealing with the issuance of temporary and permanent injunctions against establishments exhibiting "lewd" or "obscene" matter, on the grounds that, inter alia, (1) "[n]o limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction," 631 F2d 135, 138 (CA9 1980); (2) "there is no assurance that there will occur the required prompt final judicial determination on the merits," ibid.; and (3) "a defense of nonobscenity *presumably* is unavailable at a trial for violation of an injunction" (emphasis added), ibid. Even a cursory examination of the lengthy statute—which contains detailed definitions of "lewd" or "obscene" matter incorporating the standards of Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973), which provides for consolidation of the trial on the merits with the hearing on the temporary injunction and grants scheduling priority to cases brought under the statute, and which does not specify the defenses available in contempt proceedings—discloses that the state courts might well have construed the law so as to avoid each of these perceived deficiencies. It is ironic that, having exhibited no hesitation to construe the many provisions

of this complex statute without guidance from the state courts, the Court of Appeals wholly ignored an explicit severability clause and "declined" to preserve those parts of the statute *not* found unconstitutional, demurring that the reconstruction required to salvage the statute would be better handled by "the legislature of the State of Washington." 631 F2d, at 139.

In sum, both the District Court and the Court of Appeals should have declined to act until the parties had exhausted available state remedies, at least absent a showing that resort to the state courts would have been futile. There was no need whatever for federal courts to render a declaratory judgment as to the validity of a state law on which the state courts have not yet had an opportunity to speak and on behalf of parties against whom the law has not yet been applied. I would reverse and remand with directions to do now what should have been done initially.

No. 81-186. James A. McClure, United States Senator, Appellant v Ronald Reagan, President of the United States and Abner J. Mikva

454 US 1025, 70 L Ed 2d 469, 102 S Ct 559.

November 9, 1981. Appeal from the United States District Court for the District of Idaho. The judgment is affirmed. Justice Rehnquist took no part in the consideration or decision of this case.

Same case below, 513 F Supp 265.

No. 81-477. Donald M. Witte, Appellant v Bar Committee of the Twenty-First Judicial Circuit, etc.

454 US 1025, 70 L Ed 2d 469, 102 S Ct 559.

November 9, 1981. Appeal from the Supreme Court of Missouri. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Same case below, 615 SW2d 421.

No. 81-5422. William J. Crane, Appellant v B. Ross, et al.

454 US 1025, 70 L Ed 2d 469, 102 S Ct 559.

November 9, 1981. Appeal from the United States Court of Appeals for the Seventh Circuit. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Same case below, 645 F2d 78.

No. 81-478. Stephen D. Rabideau, Appellant v Attorneys Board of Professional Responsibility of Wisconsin

454 US 1025, 70 L Ed 2d 469, 102 S Ct 559.

November 9, 1981. Appeal from the Supreme Court of Wisconsin. The appeal is dismissed for want of a substantial federal question.

Same case below, 102 Wis 2d 16, 306 NW2d 1.

No. 81-524. Irene Johnson, as surviving spouse of Chester Johnson, Appellant v Kerr-McGee Oil Industries, Inc.

454 US 1025, 70 L Ed 2d 469, 102 S Ct 560.

November 9, 1981. Appeal from the Court of Appeals of Arizona, Division Two. The appeal is dismissed for want of a substantial federal question.

Same case below, 129 Ariz 393, 631 P2d 548.

APPENDIX F

OPINION OF JUSTICE WHITE, JOINED BY BURGER, BLACKMUN, REHNQUIST, STEVENS, AND O'CONNOR; WITH CONCURRING OPINION OF JUSTICE O'CONNOR, JOINED BY BURGER AND REHNQUIST; AND DISSENTING OPINION OF JUSTICE BRENNAN, JOINED BY MARSHALL, IN *BROCKETT V. SPOKANE ARCADES, INC.*, NO. 84-28, 472 U.S. 491, 86 L.ED.2D 394, 105 S.CT. 2794 (1985), REVERSING 9TH CIRCUIT COURT OF APPEALS, WHICH HAD HELD THE WASHINGTON STATE PUBLIC NUISANCE STATUTE TO BE UNCONSTITUTIONALLY BROAD.

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 28, lines 11, 37.)

[472 US 491]

DONALD C. BROCKETT, Appellant

v

SPOKANE ARCADES, INC., et al. (No. 84-28)

KENNETH EIKENBERRY, Attorney General of Washington, et al., Appellants

v

J-R DISTRIBUTORS, INC., et al. (84-143)

472 US 491, 86 L Ed 2d 394, 105 S Ct 2794

[Nos. 84-28 and 84-143]

Argued February 20, 1985. Decided June 19, 1985.

Decision: Invalidation in its entirety of state statute aimed at preventing and punishing the publication of obscene materials held improper.

SUMMARY

Various purveyors of sexually oriented books and movies filed suit for declaratory and injunctive relief challenging the constitutionality of a Washington moral nuisance statute, not yet enforced, which established penalties for persons dealing in "obscene matter," defined in part as matter appealing to a "prurient" interest, which in turn was defined as "that which incites lasciviousness or lust." The United States District Court for the Eastern District of Washington rejected all constitutional challenges to the validity of the statute (544 F Supp 1034). The United States Court of Appeals for the Ninth Circuit reversed, holding that the statute was unconstitutionally overbroad in violation of the First Amendment because, by including "lust" in its definition of "prurient," it reached material which merely stimulated normal sexual responses; and that it was appropriate to invalidate the entire statute on its face, even though it had not yet been authoritatively interpreted or enforced, because the very existence of the statute might have a chilling effect on protected expression (725 F2d 482).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by WHITE, J., joined by BURGER, Ch. J., and BLACKMUN, REHN-

Briefs of Counsel, p. 789, infra.

QUIST, STEVENS, and O'CONNOR, JJ., it was held that the First Amendment involvement in this case did not render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it, and that the statute in question should have been invalidated only insofar as the word "lust" is to be understood as reaching protected materials.

O'CONNOR, J., joined by BURGER, Ch. J., and REHNQUIST, J., concurred, expressing the view that the federal courts should have abstained from deciding the case and allowed the state courts an opportunity to construe the statute in the first instance.

BRENNAN, J., joined by MARSHALL, J., dissented, expressing the view that the statute was unconstitutionally overbroad and thus invalid on its face for the reasons stated in his dissent in Paris Adult Theaters I v Slaton (1973) 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628.

POWELL, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 930; Statutes § 58 — obscenity law — partial or facial invalidation for overbreadth

1a-1d. A state moral nuisance statute which is allegedly overbroad in violation of the First Amendment, in that its definition of the proscribed obscene matter includes "that which incites . . . lust" and thus purportedly reaches constitutionally protected material which arouses only a normal, healthy interest in sex, and which has been challenged by persons who desire to publish this sort of material and claim that they face punishment if they do so, should be invalidated only insofar as the word "lust" is to be understood as reaching protected materials and not in

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16 Am Jur 2d, Constitutional Law §§ 260 et seq., 507; 50 Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 3 et seq.; 73 Am Jur 2d, Statutes § 346

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Forms 21, 38, 71, 73

18 Am Jur Proof of Facts 465, Obscenity—Motion Pictures

10 Am Jur Trials 1, Obscenity Litigation

USCS Constitution, First Amendment

US L Ed Digest, Appeal § 1258.5; Constitutional Law § 930; Statutes §§ 37, 38, 38.5, 58

L Ed Index to Annos, Freedom of Speech, Press, Religion, and Assembly; Indecency; Statutes

ALR Quick Index, Freedom of Speech and Press; Indecency, Lewdness, and Obscenity

Federal Quick Index, Censorship; Freedom of Speech and Press; Lewdness, Indecency, and Obscenity

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Supreme Court's views as to overbreadth of legislation in connection with First Amendment rights. 45 L Ed 2d 725.

Supreme Court's development, since Roth v United States, of standards and principles determining concept of obscenity in context of right of free speech and press. 41 L Ed 2d 1257.

Modern concept of obscenity. 5 ALR3d 1158.

Validity of procedure designed to protect the public against obscenity. 5 ALR3d 1214.

its entirety, where such a limiting construction is feasible and will not invalidate the intent of the enacting legislature. (Brennan and Marshall, JJ., dissented from this holding.)

Appeal § 1258.5 — review — following lower federal court's construction of state statute

2. The United States Supreme Court will normally defer to the construction of a state statute given it by the lower federal courts; but this rule is not ironclad, and the court surely has the authority to differ with the lower federal courts as to the meaning of a state statute.

Constitutional Law § 930; Statutes § 58 — obscenity law — partial invalidation — effect of First Amendment issues

3. The involvement of the First Amendment in an action by purveyors of sexually oriented material challenging the constitutionality of an allegedly overbroad state moral nuisance statute does not render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.

Constitutional Law § 930; Statutes §§ 37, 58 — partial or facial invalidation — First Amendment issues — where affected persons are parties

4. An individual whose own speech or expressive conduct may validly be prohibited or sanctioned may challenge a statute on its face where it also threatens others not before the court who desire to engage in legally protected expression but may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid; and if the overbreadth is substantial, the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity; however, where the parties challenging the statute are those who desire to engage in protected speech which the overbroad statute purports to punish, or who seek to publish both protected and unprotected material, there is no want of a proper party to challenge the statute, and the statute may be declared invalid to the extent that it reaches too far but otherwise left intact.

Statutes § 38.5 — partial invalidation — legislative intent as to retention of valid part

5. The partial invalidation of a statute is improper if it is contrary to legislative intent in the sense that the legislature has passed an unseverable act or would not have passed it had it known that the challenged provision was invalid.

Statutes § 38 — partial invalidity — Washington law

6. Under Washington law, a statute is not to be declared unconstitutional in its entirety unless the invalid portions are unseverable and it cannot reasonably be believed that the legislature would have passed one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.

SYLLABUS BY REPORTER OF DECISIONS

A Washington statute declares to be a "moral nuisance" any place "where lewd films are publicly exhibited as a regular course of business" or "in which lewd publications constitute a principal part of the stock in trade." The statute provides that "lewd matter" is synonymous with "obscene matter" and defines these terms to mean, inter alia, any matter which the average person, applying contemporary community standards, would find, when considered as a whole, "appeals to the prurient interest." "Prurient" is defined to mean "that which incites lasciviousness or lust." Appellees—various individuals and corporations who purvey sexually oriented books and movies—challenged the statute on First Amendment grounds in Federal District Court, seeking injunctive and declaratory relief. The District Court rejected appellees' constitutional challenges. The Court of Appeals reversed, invalidating the statute in its entirety on its face on the ground that the definition of "prurient" as including "lust" was unconstitutionally overbroad in that it reached constitutionally protected material that merely stimulated normal sexual responses.

Held: The Court of Appeals erred in facially invalidating the statute in its entirety.

(a) These cases are governed by the normal rule that partial, rather than facial, invalidation is the required course. Unless there are countervailing considerations, the Washington statute should have been invalidated only insofar as the word "lust" is to be understood as reaching protected materials.

(b) Since prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex, Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 331, if the Washington statute were invalidated only insofar as the word "lust" is taken to include normal interest in sex, the statute would pass constitutional muster and would validly reach a whole range of obscene publications. Moreover, if the Court of Appeals thought that "lust" refers *only* to normal sexual appetites, it could have excised the word from the statute, since the definition also refers to "lasciviousness."

(c) Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking it down in its entirety. The statute itself contains a severability clause, and it is evident that if the statute were invalidated insofar as it proscribes materials that appeal to normal sexual appetites, the remainder of the statute would retain its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalidation.

725 F2d 482, reversed and remanded.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Blackmun, Rehnquist, Stevens, and O'Connor, JJ., joined. O'Connor, J., filed a concurring opinion, in which Burger, C. J., and Rehnquist, J., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. Powell, J., took no part in the decision of the cases.

APPEARANCES OF COUNSEL

Christine O. Gregoire argued the cause for appellants in 84-28 and 84-143.

John H. Weston argued the cause for appellees in 84-28 and 84-143.

Briefs of Counsel, p 789, infra.

OPINION OF THE COURT

[472 US 493]

Justice White delivered the opinion of the Court.

[1a] The question in this case is whether the Court of Appeals for the Ninth Circuit erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials.

I

On April 1, 1982, the Washington state moral nuisance law became effective. Wash Rev Code §§ 7.48A.010–7.48A.900 (1983).[1] It sets forth a comprehensive scheme establishing criminal and civil penalties for those who deal in obscenity or prostitution. The statute declares to be a "moral nuisance" any place "where lewd films are publicly exhibited as a regular course of business" and any place of business "in which lewd publications constitute a principal part of the stock in trade." §§ 7.48A.020(1), (3). Subsection (2) of the "Definitions" section of the statute provides that "lewd matter" is synonymous with "obscene matter," and defines these terms to mean any matter:

"(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

"(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

"(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

"(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

[472 US 494]

"(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

"(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value." § 7.48A.010(2).

The word "prurient," as used in subsection (2)(a), is defined in subsection (8) to mean "that which incites lasciviousness or lust." § 7.48A.010(8).

On April 5, four days after the effective date of the statute, appellees—various individuals and corporations who purvey sexually oriented books and movies to the adult public[2]—challenged the constitutionality of the statute in Federal District Court, seeking injunctive and declaratory relief. One of their assertions was that the statute's definition of "prurient" to include "that which incites . . . lust" was unconstitutionally overbroad because it reached material that aroused only a normal, healthy interest in sex and that the statute was therefore to be declared invalid on its face.[3] Appellees alleged that the sexually oriented films and books they sold were protected by the First Amendment, and that the state authorities would enforce the new legislation against them unless restrained by the Court. App 33. On April 13, the District Court for the Eastern District of Washington issued a preliminary injunction against enforcement of the statute. Id., at 35.

After trial, the District Court rejected all of appellees' constitutional challenges to the validity of the statute. 544 F

[472 US 495]

Supp 1034 (1982).[4] A divided panel of the Court of Appeals for the Ninth Circuit reversed. 725 F2d 482 (1984). It first held that a facial challenge to the allegedly overbroad statute was appropriate despite the fact that the law had not yet been authoritatively interpreted or enforced. This was necessary when First Amendment rights were at stake lest the very existence of the statute have a chilling effect on protected expression. The Court of Appeals acknowledged that facial invalidation required "substantial overbreadth," Broadrick v Oklahoma, 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908 (1973), but concluded that the requirement applies only when the challenged statute regulates conduct, as opposed to "pure speech." 725 F2d, at 487. Nor did the court find this to be an appropriate case for abstention. See Railroad Comm'n v Pullman Co. 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941).

Reaching the merits, the Court of Appeals held that by including "lust" in its definition of "prurient," the Washington state legislature had intended the statute to reach material that merely stimulated normal sexual responses, material that it considered to be constitutionally protected. Because in its view the statute did not lend itself to a saving construction by a state court and any application of the statute would depend on a determination of obscenity by reference to the "unconstitutionally overbroad" definition, the Court of Appeals declared the statute as a whole to be null and void.[5]

[472 US 496]

The defendant state and county officials separately appealed to this Court. We noted probable jurisdiction in both cases, 469 US 813, 83 L Ed 2d 25, 105 S Ct 76 (1984).[6]

1. An earlier moral nuisance law, Wash Rev Code § 7.48.052 et seq. (1983), adopted as an initiative measure in 1977, was struck down as an impermissible prior restraint. See Spokane Arcades, Inc. v Brockett, 631 F2d 135 (CA9 1980), summarily aff'd, 454 US 1022, 70 L Ed 2d 468, 102 S Ct 557 (1981).

2. Seven separate suits were originally filed in the District Court for the Eastern District of Washington, where they were consolidated.

3. Appellees also challenged the Washington statute's paraphrasing of the second and third parts of the test set forth in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973). See infra, at 497, 86 L Ed 2d, at 402. The District Court rejected these attacks, and the Court of Appeals did not address them. Appellees have not renewed these claims in this Court.

4. The District Court stayed its judgment to allow appellees to seek a stay pending appeal from the Court of Appeals, which the Court of Appeals subsequently granted. 725 F2d 482, 485 (1984). Thus, the statute was not enforced pending appeal.

5. Having struck down the statute in toto on overbreadth grounds, the Court of Appeals nevertheless went on to conclude that the statute's civil fine provisions were constitutionally invalid, on the theory that "the legislature will undoubtedly try again." 725 F2d, at 493. This part of the opinion was obviously unnecessary to the Court of Appeals' holding, and in view of our disposition of this case, will require reconsideration on remand.

6. Because there are no significant differences between the two cases, we do not distinguish between them in our discussion.

II

The Court of Appeals was of the view that neither Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331 (1957), nor later cases should be read to include within the definition of obscenity those materials that appeal to only normal sexual appetites. Roth held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Id., at 489, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331 (footnote omitted). Earlier in its opinion, id., at 487, n 20, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:

"I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient*, in pertinent part, as follows:

"'. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . .'

"*Pruriency* is defined, in pertinent part, as follows:

"'. . . Quality of being prurient; lascivious desire or thought. . . .'

"See also Mutual Film Corp. v Industrial Comm'n, 236 US 230, 242 [59 L Ed 2d 552, 35 S Ct 387], where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to. . . .*' *(Emphasis added.)*

[472 US 497]

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the ALI, Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), viz.:

"'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .' See Comment, id., at 10, and the discussion at page 29 et seq."

Under Roth, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in Memoirs v Massachusetts, 383 US 413, 16 L Ed 2d 1, 86 S Ct 975 (1966), established a much more demanding three-part definition of obscenity, a definition that was in turn modified in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973).[7] The Miller guidelines for identifying obscenity are:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v Wisconsin, [408 US,] at 230 [33 L Ed 2d 312, 92 S Ct 2245], quoting Roth v United States, supra, at 489 [1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id., at 24, 37 L Ed 2d 419, 93 S Ct 2607.

Miller thus retained, as had Memoirs, the Roth formulation as the first part of this test, without elaborating on or disagreeing

[472 US 498]

with the definition of "prurient interest" contained in the Roth opinion.

The Court of Appeals was aware that Roth had indicated in footnote 20 that material appealing to the prurient interest was "material having a tendency to excite lustful thoughts" but did not believe that Roth had intended to characterize as obscene material that provoked only normal, healthy sexual desires. We do not differ with that view. As already noted, material appealing to the "prurient interest" was itself the definition of obscenity announced in Roth; and we are quite sure that by using the words "lustful thoughts" in footnote 20, the Court was referring to sexual responses over and beyond those that would be characterized as normal. At the end of that footnote, as the Court of Appeals observed, the Roth opinion referred to the Model Penal Code definition of obscenity—material whose predominate appeal is to "a shameful or morbid interest in nudity, sex, or excretion" and indicated that it perceived no significant difference between that definition and the meaning of obscenity developed in the case law. This effectively negated any inference that "lustful thoughts" as used earlier in the footnote was limited to or included normal sexual responses.[8] It would require more

[472 US 499]

than the possible ambiguity in footnote 20 to lead us to believe that the Court intended to characterize as obscene and exclude from the protection of the First Amendment any and all speech that aroused any sexual responses, whether normal or morbid.

7. The basic difference between the Memoirs test and the Miller test was the Memoirs requirement that in order to be judged obscene, a work must be "utterly without redeeming social value." 383 US, at 418, 16 L Ed 2d 1, 86 S Ct 975. Miller settled on the formulation, "whether the work, taken as a whole, lacks serious literary, artistic, po'itical, or scientific value." 413 US, at 24, 37 L Ed 2d 419, 93 S Ct 2607.

8. This conclusion is bolstered by a subsequent footnote, 354 US, at 489, n 26, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 2d 331, referring to a number of cases defining obscenity in terms of "lust" or "lustful." See Parmelee v United States, 72 App DC 203, 210, 113 F2d 729, 736 (1940) (material is protected if "the erotic matter is not introduced to promote lust"); United States v Dennett, 39 F2d 564, 569 (CA2 1930) (sex education pamphlet not obscene because tendency is to "rationalize and dignify [sex] emotions rather than to arouse lust"); United States v One Book Called "Ulysses," 5 F Supp 182, 184 (SDNY 1933), aff'd, 72 F2d 705 (CA2 1934) (meaning of the word "obscene" is "(t)ending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); Commonwealth v Isenstadt, 318 Mass 543, 549-550, 62 NE2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); Missouri v Becker, 364 Mo 1079, 1085, 272 SW2d 283, 286 (1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); Adams Theatre Co. v Keenan, 12 NJ 267, 272, 96 A2d 519, 521 (1953) (Brennan, J.) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire' ").

Appellants urge that because Roth defined prurience in terms of lust, the Washington obscenity statute cannot be faulted for defining "prurient" as that which "incites lasciviousness or lust." Whatever Roth meant by "lustful thoughts"—and the State agrees that the Court did not intend to include materials that provoked only normal sexual reactions—that meaning should be attributed to the term "lust" appearing in the state law. On this basis, the State submits that the statute cannot be unconstitutional for defining prurience in this manner.

The Court of Appeals rejected this view, holding that the term "lust" had acquired a far broader meaning since Roth was decided in 1957. The word had come to be understood as referring to a "healthy, wholesome, human reaction common to millions of well-adjusted persons in our society," rather than to any shameful or morbid desire. 725 F2d, at 490. Construed in this way, the statutory definition of prurience would include within the first part of the Miller definition of obscenity material that is constitutionally protected by the First Amendment: material that, taken as a whole, does no more than arouse, "good, old fashioned, healthy" interest in sex. Id., at 492, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331. The statute, the Court of Appeals held, was thus overbroad and invalid on its face.

[2] Appellants fault the Court of Appeals for construing the statute in this manner. Normally, however we defer to the construction of a state statute given it by the lower federal courts. Chardon v Fumero Soto, 462 US 650, 654-655, n 5, 77 L Ed 2d 74, 103 S Ct 2611 (1983); Haring v Prosse, 462 US 306, 314, n 8, 76 L Ed 2d 595, 103 S Ct 2368 (1983); Pierson v Ray, 386 US 547, 558, n 12, 18 L Ed 2d 288, 87 S Ct 513 (1967); General Box

[472 US 500]

Co. v United States, 351 US 159, 165, 100 L Ed 1055, 76 S Ct 728 (1956). We do so not only to "render unnecessary review of their decisions in this respect," Cort v Ash, 422 US 66, 73, n 6, 45 L Ed 2d 26, 95 S Ct 2080 (1975), but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States. See Bishop v Wood, 426 US 341, 345-346, 48 L Ed 2d 684, 96 S Ct 2074 (1976); Gooding v Wilson, 405 US 518, 524, and n 2, 31 L Ed 2d 408, 92 S Ct 1103 (1972). The rule is not ironclad, however, and we surely have the authority to differ with the lower federal courts as to the meaning of a state statute.[9] It may also be that, other things being equal, this would not be a case for deferring to the

9. The Court has stated that it will defer to lower courts on state-law issues unless there is "plain" error, Palmer v Hoffman, 318 US 109, 118, 87 L Ed 645, 63 S Ct 447, 144 ALR 719 (1943); the view of the lower court is "clearly wrong," The Tungus v Skovgaard, 358 US 588, 596, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280 (1959); or the construction is "clearly erroneous," United States v Durham Lumber Co. 363 US 522, 527, 4 L Ed 2d 1371, 80 S Ct 1282 (1960), or "unreasonable," Propper v Clark, 337 US 472, 486-487, 93 L Ed 1480, 69 S Ct 1333 (1949). On occasion, then, the Court has refused to follow the views of a lower federal court on an issue of state law. In Cole v Richardson, 405 US 676, 683-684, 31 L Ed 2d 593, 92 S Ct 1332 (1972), e.g., we refused to accept a three-judge District Court's construction of a single statutory word based on the dictionary definition of that language where more reliable indicia of the legislative intent were available.

Court of Appeals.[10] But we pretermit this

[472 US 501]

issue, for the Court of Appeals fell into another error when it invalidated the statute on its face because of its "unconstitutionally overbroad" definition of obscenity.

III

Appellants insist that the error was in finding any invalidity in the statute, even accepting the court's construction of the word "lust." To be obscene under Miller, a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value. Appellants submit that the latter two Miller guidelines, which the Washington statute faithfully follows, will completely cure any overbreadth that may inhere in the statute's definition of prurience as construed by the Court of Appeals. We are not at all confident that this would always be the case. It could be that a publication that on the whole arouses normal sexual responses would be declared obscene because it contains an isolated example of conduct required by the second guideline and because it also fails to have the redeeming value required by the third. Under the existing case law, material of that kind is not without constitutional protection."

[1b] Facial invalidation of the statute was nevertheless improvident. We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" United States v Raines, 362 US 17, 21, 4 L Ed 2d 524, 80 S Ct 519

[472 US 502]

(1960), quoting Liverpool, New York & Philadelphia S.S. Co. v Commissioners of Emigration, 113 US 33, 39, 28 L Ed 899, 5 S Ct 352 (1885). Citing a long line of cases, Raines also held that "[k]indred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." These guideposts are at the

10. Appellants make a strong argument that the Court of Appeals erred in construing the Washington statute. The Court of Appeals relied on dictionary definitions of "prurient" and "lust," saying that the most recent edition of Webster's Third New International Dictionary (Unabridged, 4th ed. 1976) did not include the word "lust" in its definition of "prurient." But neither did the edition of Webster cited by the Roth court. Webster's Second Edition defined "lust" as (excluding the obsolete meanings):
"sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion." Webster's New International Dictionary (Unabridged, 2d ed, 1949).
Furthermore, and of some significance, the word "lust" is defined in Webster's Third New International (Unabridged, 5th ed, 1981) in pertinent part as follows:
"1 obs. a: PLEASURE, GRATIFICATION, DELIGHT . . . b: personal inclination: WISH, WHIM . . . c: VIGOR, FERTILITY . . . 2: sexual desire esp. of a violent self-indulgent character: LECHERY, LASCIVIOUSNESS . . . 3 a: an intense longing: CRAVING . . . b: EAGERNESS, ENTHUSIASM."

11. Roth specifically rejected a standard of obscenity that "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." 354 US, at 488-489, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331 (discussing Queen v Hicklin, [1868] LR 3 Q B 360).

bottom of the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Allen v Louisiana, 103 US 80, 83-84, 26 L Ed 318 (1881), quoted with approval in Field v Clark, 143 US 649, 695-696, 36 L Ed 294, 12 S Ct 495 (1892). Absent "weighty countervailing" circumstances, Raines, supra, at 22, 4 L Ed 2d 524, 80 S Ct 519, this is the course that the Court has adhered to. Reagan v Farmers' Loan & Trust Co. 154 US 362, 395-396, 38 L Ed 1014, 14 S Ct 1047 (1894); Champlin Refining Co. v Corporation Comm'n, 286 US 210, 234-235, 76 L Ed 1062, 52 S Ct 559, 86 ALR 403 (1932); Watson v Buck, 313 US 387, 395-396, 85 L Ed 1416, 61 S Ct 962, 136 ALR 1426 (1941); Buckley v Valeo, 424 US 1, 108, 46 L Ed 2d 659, 96 S Ct 612 (1976). Just this Term, in Tennessee v Garner, 471 US 1, 85 L Ed 2d 1, 105 S Ct 1694 (1985), we held unconstitutional a state statute authorizing the use of deadly force against fleeing suspects, not on its face, but only insofar as it authorized the use of lethal force against unarmed and nondangerous suspects.

[3] Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it. Buckley v Valeo, supra, illustrates as much. So does Cantwell v Connecticut, 310 US 296, 84 L Ed 1213, 60 S Ct 900, 128 ALR 1352 (1940), where the Court did not invalidate the state offense of "breach of the peace" on its face but only to the extent that it was construed and applied to prevent the peaceful distribution of religious literature on the streets. In Marsh v Alabama, 326 US 501, 90 L Ed 265, 66 S Ct 276 (1946), the Court struck

[472 US 503]

down a state trespass law only "[i]nsofar as the State has attempted to impose criminal punishment" on those distributing literature on the streets of a company town. Id., at 509, 90 L Ed 265, 66 S Ct 276. NAACP v Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328 (1963), did not facially invalidate the State's rules against solicitation by attorneys but only as they were sought to be applied to the activities of the NAACP involved in that case. Id., at 419, 439, 9 L Ed 2d 405, 83 S Ct 328. More recently, in United States v Grace, 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702 (1983), we declined to invalidate on its face a federal statute prohibiting demonstrations on the Supreme Court grounds and confined our holding to the invalidity of the statute as applied to picketing on the public sidewalks surrounding the building. Id., at 175, 75 L Ed 2d 736, 103 S Ct 1702.

[4] For its holding that in First Amendment cases an overbroad statute must be stricken down on its face, the Court of Appeals relied on that line of cases exemplified by Thornhill v Alabama, 310 US 88, 84 L Ed 1093, 60 S Ct 736 (1940), and more recently by Village of Schaumburg v Citizens for a Better Environment, 444 US 620, 63 L Ed 2d 73, 100 S Ct 826 (1980). In those cases, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not

before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial,"[12] the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by

[472 US 504]

legislative action or by judicial construction or partial invalidation. Broadrick v Oklahoma, 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908 (1973).

It is otherwise where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, or who seek to publish both protected and unprotected material. There is then no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.

[1c] The cases before us are ones governed by the normal rule that partial, rather than facial, invalidation is the required course. The Washington statute was faulted by the Court of Appeals only because it reached material that incited normal as well as unhealthy interest in sex, and appellees, or some of them, desiring to publish this sort of material, claimed that they faced punishment if they did so. Unless there are countervailing considerations, the Washington law should have been invalidated only insofar as the word "lust" is to be understood as reaching protected materials.

The Court of Appeals was of the view that the term "lust" did not lend itself to a limiting construction and that it would not be feasible to separate its valid and invalid applications. Even accepting the Court of Appeals' construction of "lust," however, we are unconvinced that the identified overbreadth is incurable and would taint all possible applications of the statute, as was the case in Secretary of State of Maryland v Joseph H. Munson Co. 467 US 947, 81 L Ed 2d 786, 104 S Ct 2839 (1984). See also City Council of Los Angeles v Taxpayers for Vincent, 466 US 789, 796-799, and nn 12-16, 80 L Ed 2d 772, 104 S Ct 2118 (1984). If, as we have held, prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex, Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, 4 Ohio Ops 2d 331 (1957), it is equally certain that if the statute at issue here is invalidated only insofar as the word "lust" is taken to include

[472 US 505]

normal interest in sex, the statute would pass constitutional muster and would validly reach the whole range of obscene publications. Furthermore, had the Court of Appeals thought that "lust"

12. The Court of Appeals erred in holding that the Broadrick v Oklahoma, 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908 (1973), substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. New York v Ferber, 458 US 747, 772, 73 L Ed 2d 1113, 102 S Ct 3348 (1982), specifically held to the contrary. Because of our disposition of these cases, we do not address the issue whether the overbreadth of the Washington statute, in relation to its legitimate reach, is substantial and warrants a declaration of facial invalidity. See Secretary of State of Maryland v Joseph H. Munson Co. 467 US 947, 964-965, 81 L Ed 2d 786, 104 S Ct 2839 (1984); CSC v Letter Carriers, 413 US 548, 580-581, 37 L Ed 2d 796, 93 S Ct 2880 (1973).

refers *only* to normal sexual appetites, it could have excised the word from the statute entirely, since the statutory definition of prurience referred to "lasciviousness" as well as "lust." Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking the statute down in its entirety because of invalidity in all of its applications.[13]

[472 US 506]

[1d, 5, 6] Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid. But here the statute itself contains a severability clause;[14] and under Washington law, a statute is not to be declared unconstitutional in its entirety unless "the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the

13. According to appellees, the vast majority of state statutes either leave the word "prurient" undefined or adopt a definition using the words "shameful or morbid." Brief for Appellees 26-27. One State, New Hampshire, defines prurient interest as "an interest in lewdness or lascivious thoughts." NH Rev Stat Ann §§ 650:(1)(I)-(IV)(a) (Supp 1983). Mississippi is apparently the only State other than Washington to use the word "lust" in its definition of "prurient." Miss Code Ann § 97-29-103(1)(a) (Supp 1984) ("a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion"). The District Court for the Northern District of Mississippi has issued a preliminary injunction against enforcement of the statute, partly on the ground that "[t]he inclusion of the terms lustful and erotic [in the definition of prurient] would permit the application of the statute to arguably protected materials." Goldstein v Allain, 568 F Supp 1377, 1385 (1983), appeal stayed pending trial on the merits, Case No. 83-4452 (CA5, June 20, 1984).

Some lower courts considering the issue have used the words "shameful or morbid" in describing the "prurient interest" that distinguishes obscene materials. See, e. g., Red Bluff Drive-In, Inc. v Vance, 648 F2d 1020, 1026 (CA5 1981), cert denied sub nom. Theatres West, Inc. v Holmes, 455 US 913, 71 L Ed 2d 453, 102 S Ct 1264 (1982); Leach v American Booksellers Assn., Inc. 582 SW2d 738, 749-750 (Tenn 1979). Others, however, have used "lust" in connection with definitions of "prurient," reading the word as connoting a sense of shame or debasement, or relying on its use in Roth. See, e. g., United States v 35 MM. Motion Picture Film Entitled "Language of Love," 432 F2d 705, 711-712 (CA2 1970); Childs v Oregon, 431 F2d 272, 275 (CA9 1970); Flying Eagle Publications, Inc. v United States, 273 F2d 799, 803 (CA1 1960).

An obscenity statute that leaves the word "prurient" undefined, or rather, defined only by case law has been sustained. See Red Bluff Drive-In, Inc. v Vance, supra, at 1026. See also Ward v Illinois, 431 US 767, 775, 52 L Ed 2d 738, 97 S Ct 2085 (1977) (state obscenity statute not overbroad for failure to expressly describe the kinds of sexual conduct intended to be referred to under part (b) of Miller guidelines, where state court had construed statute to incorporate the examples of sexual conduct mentioned in Miller). A predecessor of the Washington statute at issue here similarly used the word "prurient" without defining it. Wash Rev Code § 7.48.050 et seq. (1983). The Court of Appeals for the Ninth Circuit struck down the statute on other grounds, but apparently the use of the word "prurient" was not challenged. See Spokane Arcades v Brockett, 631 F2d, at 136, n 1. An earlier predecessor statute used only the word "obscene," without any further definition whatsoever. The Washington Supreme Court construed the statute to incorporate the Roth-Miller test, saving it from unconstitutional vagueness. See State v J-R Distributors, Inc. 82 Wash 2d 584, 602-603, 512 P2d 1049, 1061 (1973). The evident likelihood that the Washington courts would construe the instant statute to conform with the Miller standards also counsels against facial invalidation in this case. Cf. Time, Inc. v Hill, 385 US 374, 17 L Ed 2d 456, 87 S Ct 534 (1967).

14. "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." Wash Rev Code § 7.48A.900 (1983).

elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." State v Anderson, 81 Wash 2d 234, 236, 501 P2d 184, 185-186 (1972).[15] It would be frivolous to suggest, and

[472 US 507]

no one does, that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute. And it is quite evident that the remainder of the statute retains its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalidation, which is the course the Court of Appeals should have pursued.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice Powell took no part in the decision of these cases.

SEPARATE OPINIONS

Justice O'Connor, with whom The Chief Justice and Justice Rehnquist join, concurring.

Only days after the State of Washington adopted the moral nuisance law at issue here, appellees launched a constitutional attack in Federal District Court. Although the statute has never been enforced or authoritatively interpreted by a state court, appellees allege that it applies to constitutionally protected expression and is facially invalid. Because I believe that the federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law in the first instance, I think the proper disposition of these cases would be to vacate the judgment of the Court of Appeals on that ground. The Court, however, rejects that course and reaches the merits of the controversy. I join the opinion of the Court because I agree that the Court of Appeals erred in declaring the statute invalid on its face.

[472 US 508]

Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law. In Railroad Comm'n v Pullman Co. 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941), the Court held that where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions. Id., at 501, 85 L Ed 971, 61 S Ct 643; see also Hawaii Housing Authority v Midkiff, 467 US 229, 236-237, 81 L Ed 2d 186, 104 S Ct 2321 (1984). This doctrine of abstention acknowledges that federal courts should avoid the unnecessary resolu-

15. This standard is similar to that which we would apply in determining the severability of a federal statute: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " See Buckley v Valeo, 424 US 1, 108-109, 46 L Ed 2d 659, 96 S Ct 612 (1976), quoting Champlin Refining Co. v Corporation Comm'n, 286 US 210, 234, 76 L Ed 1062, 52 S Ct 559, 86 ALR 403 (1932).

tion of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law.

Attention to the policies underlying abstention makes clear that in the circumstances of these cases, a federal court should await a definitive construction by a state court rather than precipitously indulging a facial challenge to the constitutional validity of a state statute. There can be no doubt that a state obscenity statute concerns important state interests. Such statutes implicate "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Paris Adult Theatre I v Slaton, 413 US 49, 58, 37 L Ed 2d 446, 93 S Ct 2628 (1973). The nature of the overbreadth claim advanced by appellees suggests that abstention was required because the Washington statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." Harman v Forssenius, 380 US 528, 535, 14 L Ed 2d 50, 85 S Ct 1177 (1965).

The First Amendment overbreadth doctrine allows a challenge to the validity of a statute on its face only if the law is substantially overbroad. City Council of Los Angeles v Taxpayers for Vincent, 466 US 789, 799-801, 80 L Ed 2d 772, 104 S Ct 2118 (1984); New York v Ferber, 458 US 747, 769-773, 73 L Ed 2d 1113, 102 S Ct 3348 (1982). Thus, analysis of the constitutional claims advanced by appellees necessarily

[472 US 509]

requires construction of the Washington statute to assess its scope. Id., at 769, n 24, 73 L Ed 2d 1113, 102 S Ct 3348; Broadrick v Oklahoma, 413 US 601, 618, n 16, 37 L Ed 2d 830, 93 S Ct 2908 (1973) ("[A] federal court must determine what a state statute means before it can judge its facial constitutionality"). Furthermore, a narrowing construction of a statute might obviate any challenge on overbreadth grounds. E. g., id., at 617-618, 37 L Ed 2d 830, 93 S Ct 2908 (relying on interpretation of State Personnel Board and Attorney General to reject overbreadth claim). Where a state statute has never been construed or applied, it seems rather obvious that interpretation of the statute by a state court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution.

The Court of Appeals opined that the Washington statute is not susceptible to a limiting construction and therefore any interpretation by the state court would "neither eliminate nor materially change the constitutional issues presented here." 725 F2d 482, 488 (1984). This assertion is simply implausible. As noted in the opinion of this Court, the conclusion below that the state statute reaches *any* expression protected by the First Amendment rests on a dubious interpretation of the word "lust" as used in the statute. Ante, at 500-501, n 10, 86 L Ed 2d, at 404. Both the text and the background of the Washington statute indicate that the state legislature sought to conform the moral nuisance law to the constitutional standards outlined by this Court in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973). Moreover, the state courts have demonstrated their willingness to construe state obscenity laws in accord with Miller. See State v J-R Distributors, Inc. 82 Wash 2d 584, 512 P2d 1049 (1973), cert denied, 418 US 949, 41 L Ed 2d 1166, 94 S Ct 3217 (1974).

Apart from its unwarranted belief

that the statute is not fairly subject to a limiting construction, the Court of Appeals asserted that Pullman abstention should "almost never" apply where a state statute is challenged on First Amendment grounds "because the constitutional guarantee of free expression is, quite properly, always an area of particular

[472 US 510]

federal concern." 725 F2d, at 488. This Court has never endorsed such a proposition. See Babbitt v Farm Workers, 442 US 289, 306-312, 60 L Ed 2d 895, 99 S Ct 2301 (1979). On the contrary, even in cases involving First Amendment challenges to a state statute, absention may be required " 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.' " Id., at 306, 60 L Ed 2d 895, 99 S Ct 2301, quoting Harman v Forssenius, supra, at 534, 14 L Ed 2d 50, 85 S Ct 1177; see also Harrison v NAACP, 360 US 167, 176-178, 3 L Ed 2d 1152, 79 S Ct 1025 (1959).

The decision of the Court of Appeals represents a premature and avoidable interference with the enforcement of state law in an area of special concern to the States. Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court. Wash Rev Code §§ 2.60.010-2.60.900 (1983); Wash Rule App Proc 16.16. Cf. Bellotti v Baird, 428 US 132, 150-151, 49 L Ed 2d 844, 96 S Ct 2857 (1976). In my view, the state courts should have been afforded an opportunity to construe the Washington moral nuisance law in the first instance.

Justice Brennan, with whom Justice Marshall joins, dissenting.

We granted certiorari to consider the holding of the United States Court of Appeals for the Ninth Circuit that the Washington state obscenity law, Wash Rev Code §§ 7.48A.010-7.48A.900 (1983), is substantially overbroad and therefore invalid on its face under the First Amendment because it defines "prurient" in such a way as to reach constitutionally protected material that stimulates no more than a healthy interest in sex. This statute is, in my view, unconstitutionally overbroad and therefore invalid on its face for the reasons given in my dissent in Paris Adult Theatre I v Slaton, 413 US 49, 73, 37 L Ed 2d 446, 93 S Ct 2628 (1973). I would therefore affirm the judgment of the Court of Appeals.

APPENDIX G

TWO OPINIONS IN *WORLD FAMOUS DRINKING EMPORIUM, INC. V. CITY OF TEMPE, ARIZONA*, 820 F.2D 1079 (9TH CIR. 1987), HOLDING THAT, IN CASES WHERE THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINES APPLY, THE FEDERAL COMPLAINT MUST BE DISMISSED.

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ...Page 29, line 12.)

WORLD FAMOUS DRINKING EMPORIUM, INC., an Arizona corporation; Robert Eve and Michael Miller, Plaintiffs-Appellants,

v.

CITY OF TEMPE, a municipal corporation; Tempe Board of Adjustment; the Honorable Paul LaPrade, Maricopa County Superior Court Judge, Defendants-Appellees.

No. 85-2796.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1986.

Decided June 26, 1987.

Nightclub brought § 1983 suit challenging city's denial of an entertainment permit. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., granted city's motion to dismiss, and nightclub appealed. The Court of Ap-

peals, Tang, Circuit Judge, held that abstention was appropriate, considering that plaintiff failed to appeal adverse state judgments, thus satisfying requirement of ongoing state judicial proceedings, that important state interest was implicated in the proceedings, and that plaintiff had an adequate opportunity to raise its constitutional claim in state proceedings.

Affirmed.

Kennedy, Circuit Judge, concurred in the judgment with statement.

1. Federal Courts ⇐776

District court's determination that legal requirements of abstention are met is reviewed de novo.

2. Federal Courts ⇐65

If legal requirements for abstention are not met, there is no discretion to abstain.

3. Federal Courts ⇐813

If legal requirements for abstention are met, decision whether to abstain is reviewed for an abuse of discretion.

4. Federal Courts ⇐41

Abstention from exercising of federal jurisdiction is the exception, not the rule; absent significant countervailing interests, federal courts are obliged to exercise their jurisdiction.

5. Federal Courts ⇐41

Failure to exhaust state appellate remedies satisfies requirement that there be "ongoing judicial proceedings" in order to justify federal abstention.

6. Federal Courts ⇐53

A First Amendment challenge does not alter propriety of abstention in a case in which there are ongoing state judicial proceedings. U.S.C.A. Const.Amend. 1.

7. Federal Courts ⇐65

In evaluating whether ongoing state proceedings implicate important state interests, so as to justify abstention, Court of Appeals examines nature of the proceedings; fact that noncriminal proceedings closely relate to criminal proceedings, or vindicate important state policies, or are necessary for functioning of state judicial system, demonstrates an important state interest justifying abstention.

8. Federal Courts ⇐48

Abstention was proper with respect to § 1983 suit challenging city's denial of entertainment permit for nightclub featuring live entertainment in the form of female "go-go" and "flash" dancers; plaintiff's failure to appeal adverse judgments in two related state cases satisfied requirement of ongoing state judicial proceedings; important state interest was implicated in state proceedings and plaintiff had an adequate opportunity to litigate his constitutional claim in state forum. 42 U.S.C.A. § 1983.

Michael B. Scott, Phoenix, Ariz., for plaintiffs-appellants.

W. Kent Foree, Tempe, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before KENNEDY, TANG and THOMPSON, Circuit Judges.

TANG, Circuit Judge:

Appellant World Famous Drinking Emporium, Inc. ["World Famous"] appeals from the judgment of dismissal of its claim under 42 U.S.C. § 1983, entered upon the basis of the abstention doctrine as enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

FACTS AND PROCEEDINGS:

Pursuant to a municipal zoning ordinance[1] World Famous sought an entertainment use permit from Tempe for a nightclub featuring live entertainment in the form of female "go-go" and "flash" dancers.[2]

1. The ordinance read in pertinent part:
"4. The granting of such use permits rests with the sole discretion of the Board or Commission and Council upon finding that the use covered by the permit, the manner of conducting the same, and any building which is involved will not be detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general....
In arriving at the above determination, the facts which shall be considered shall include, but not be limited to, the following:
a. Damage or nuisance arising from noise, smoke, odor, dust, vibration or illumination.
b. Hazard to persons and property from possible explosion, contamination, fire or flood.
c. Hazard occasioned by unusual volume or character of traffic.
d. Character of proposed building and site.
e. A demonstrated need of such use.
* * * * * *
6. Any use permits granted may be subject to such conditions as the Board, or Commission and Council deem applicable in order to fully carry out the provisions and intent of this Ordinance."

World Famous I

The Tempe Board of Adjustment ["the Board"] held its first hearing on World Famous' application in November 1983. The Board denied the application. Upon reconsideration in January 1984, the Board denied the application a second time. World Famous then sought to overrule the Board by way of a "special action" proceeding in Maricopa County Superior Court.[3] Judge Marquardt upheld the Board.

World Famous II

World Famous' continued operation led Tempe to file criminal proceedings and a civil enforcement action. In the latter action, Tempe sought preliminary and permanent injunctive relief. World Famous opposed Tempe's request by arguing, inter alia, the unconstitutionality of the zoning ordinance. Judge LaPrade granted the preliminary injunction on September 27, 1984. World Famous complied with the terms of the injunction and ceased presenting go-go and flash dancing. Following denial by the Arizona Supreme Court of special action relief, Tempe dismissed the criminal proceeding. Judge LaPrade denied World Famous' motions to dissolve the injunction and to dismiss the case, and granted Tempe's motion for summary judgment.

World Famous III

World Famous again sought the requisite use permit without success, and filed another special action petition in Superior Court, which was dismissed by Judge Howe on August 16, 1985.

World Famous IV

World Famous filed its § 1983 action on July 17, 1985 in United States District Court for the District of Arizona. Based solely upon the abstention doctrine as enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), Judge Strand granted Tempe's motion to dismiss on September 8, 1985, stating in his memorandum:

> The issue of the constitutionality of the Tempe zoning ordinance is presently before the trial court in this case and would be subject to appellate review in the state court should an aggrieved party elect to take such action.

World Famous timely appealed.

DISCUSSION:

[1-3] The district court's determination that the legal requirements of abstention are met is reviewed de novo. *See Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466 (9th Cir.1984). Unless the legal requirements for abstention are met, there is no discretion to abstain. *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir.1983). If the legal requirements for abstention are met, the

2. The terms "go-go" and "flash" dancing in the instant case denote dancing by performers wearing opaque material covering the nipples and areolas of the breasts and bikini-type bottoms.

3. The scope of special action review is established by Rule 3 of the Arizona Rules of Procedure for Special Action, which reads in pertinent part:
"The only questions that may be raised in a Special Action are:
(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
(c) Whether a determination was arbitrary and capricious or an abuse of discretion."

decision whether to abstain is reviewed for an abuse of discretion. *McIntyre v. McIntyre*, 771 F.2d 1316 (9th Cir.1985).

[4] Abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Absent significant countervailing interests, the federal courts are obliged to exercise their jurisdiction. *Id.; County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). In *Younger v. Harris*, the Supreme Court held that federal courts should not enjoin pending state criminal proceedings except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. 401 U.S. at 46, 91 S.Ct. at 751. *Id.* Three requirements have evolved for proper invocation of *Younger*: (1) ongoing state judicial proceedings; (2) implication of an important state interest in the proceedings; and (3) an adequate opportunity to raise federal questions in the proceedings. *Goldie's*, 739 F.2d at 469 (citing *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1981)). Bad faith prosecution or harassment make abstention inappropriate even where these requirements are met. *Younger*, 401 U.S. at 47–49, 91 S.Ct. at 752–53. Similarly, satisfaction of the three requirements will not support abstention where a statute is flagrantly and patently violative of constitutional prohibitions. *Id.* at 53–54, 91 S.Ct. at 755–56.

1. Ongoing State Proceedings

[5, 6] At the time the district court abstained, World Famous had yet to appeal the adverse judgments in *World Famous II* and *World Famous III* to the state Supreme Court. Failure to exhaust state appellate remedies satisfies the requirement that there be "ongoing judicial proceedings" in order to justify federal abstention. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608–09, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975). A First Amendment challenge does not alter the propriety of abstention in such a case. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) (abstention proper where a First Amendment challenge may be raised in state court review of an administrative proceeding); *Huffman*, 420 U.S. at 612–13, 95 S.Ct. at 1212, 43 L.Ed.2d 482 (1975).

2. Important State Interest Implicated in State Proceedings

[7] *Younger* abstention is not limited to ongoing state criminal proceedings, *see, e.g., Huffman*, 420 U.S. at 608, 95 S.Ct. at 1210. It extends to certain civil proceedings provided those proceedings implicate important state interests. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) (state civil rights enforcement proceedings); *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (temporary removal of child in child-abuse context); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (proceeding for recovery of fraudulently obtained welfare benefits); *Middlesex*, 423 U.S. at 432, 102 S.Ct. at 2521 (state bar discipline proceedings); *Huffman*, 420 U.S. at 605, 95 S.Ct. at 1208 (state nuisance proceeding akin to criminal prosecution). In evaluating whether the proceedings implicate important state interests, we examine the nature of the proceedings. The fact that the noncriminal proceedings closely relate to criminal proceedings, *see Huffman*, 420 U.S. at 604, 95 S.Ct. at 1208, or vindicate important state policies, *see Trainor*, 431 U.S. at 445, 97 S.Ct. at 1919, or are necessary for the functioning of the state judicial system, *see Juidice v. Vail*, 430 U.S. 327, 336, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376 (1977), demonstrates an important state interest. *See Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520. In each of these cases, the state was a party to the proceedings. *See Miofsky v. Superior Court*, 703 F.2d 332, 337 (9th Cir.1983). *See also Worldwide Church of God, Inc. v. California*, 623 F.2d 613, 616 (9th Cir.1980) (state receivership order pursuant to investigation and regulation of fraud in charitable trusts), *cert. denied*, 449 U.S. 900, 101 S.Ct. 270, 66 L.Ed.2d 130 (1980); *Rosenthal v. Carr*, 614 F.2d 1219, 1220 (9th Cir.) (state bar disciplinary proceedings), *cert. denied* 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980).

[8] Here, Tempe brought a civil action in order to obtain compliance with an ordinance which aims at avoidance of public nuisances. It had the option of proceeding either by civil or criminal enforcement of its municipal ordinance; the option of criminal enforcement demonstrates the importance of the underlying state interest. *See Trainor*, 431 U.S. at 449–50, 97 S.Ct. at 1920–21 (Blackmun, J., concurring). Such an action, in aid of and closely related to Tempe's zoning ordinance and akin to a criminal prosecution, clearly involves an important state interest. *See Middlesex*, 457 U.S. at 434, 102 S.Ct. at 2522 (state bar disciplinary action); *Trainor*, 431 U.S. at 444, 97 S.Ct. at 1918 (civil proceeding brought to recover fraudulently obtained welfare payments); *Huffman*, 420 U.S. at 604, 95 S.Ct. at 1208 (public nuisance action). *Cf. Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 532–33 (9th Cir. 1984) (city's suit for declaratory relief not similar to criminal or "quasi-criminal" proceedings, nor did it involve interests vital to operation of state government), *rev'd on other grounds*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Goldie's*, 739 F.2d at 469 (private unlawful detainer action does not implicate state interests); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir.1983) (private tort litigation does not implicate state interests). As such, the second requirement for the proper invocation of *Younger* abstention is satisfied.

3. Adequate Opportunity to Raise Federal Question

World Famous has failed to demonstrate how review of the adverse judgments in the state courts would not have permitted an opportunity to litigate its constitutional claims. That World Famous failed to avail itself of the opportunity to litigate its constitutional claim in the state forum, does not demonstrate that the state forum did not provide an opportunity to litigate that claim. *See Juidice v. Vail*, 430 U.S. 327, 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977). World Famous had an opportunity to pursue its constitutional claim upon appeal in the state courts,[4] and failed to do so. No more is required for *Younger* abstention. *See Ohio Civil Rights Commission*, 106 S.Ct. at 2724; *Moore*, 442 U.S. at 426, 99 S.Ct. at 2379; *Juidice*, 430 U.S. at 337, 97 S.Ct. at 1218.

Further, the record reveals no harassment or bad faith on the part of Tempe in bringing the civil enforcement and criminal proceedings which would make abstention improper. *See Huffman*, 420 U.S. at 611, 95 S.Ct., at 1211.

We hold abstention was proper and the merits of the constitutionality issue are not properly before this Court. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). *See also Huffman*, 420 U.S. at 602, 95 S.Ct. at 1207 (facial invalidity of statute is not exceptional circumstance justifying federal interference with state criminal proceedings) (citing *Younger*, 401 U.S. at 53–54, 91 S.Ct. at 754–55).

We also decline to consider World Famous' estoppel argument. World Famous fails to provide us with a reason for its failure to raise the estoppel issue below. Nor is the estoppel determination one of law whose proper resolution is beyond any doubt, *see Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir.1980). Accordingly, the estoppel issue is not properly before us. *See Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984); *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 665–56 (9th Cir.1984).

4. We note that the scope of review of a special action provides for consideration of "[w]hether the defendant has proceeded ... without or in excess of jurisdiction or legal authority." Ariz. Rev.Stat.Ann., Rules of Procedure for Special Actions 3 (1973). It appears that the state courts could construe municipal ordinances in light of federal constitutional law. *Cf. Ohio Civil Rights Committee*, 106 S.Ct. at 2724.

Affirmance makes unnecessary the consideration of Tempe's assertion that World Famous' action is precluded by the adverse determinations below.

AFFIRMED.

KENNEDY, Circuit Judge, concurring:

General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and *Huffman* squarely controls. I concur in the judgment.

WORLD FAMOUS DRINKING EMPORIUM, INC., an Arizona corporation; Robert Eve and Michael Miller, Plaintiffs-Appellants,

v.

CITY OF TEMPE, a municipal corporation; Tempe Board of Adjustment; the Honorable Paul LaPrade, Maricopa County Superior Court Judge, Defendants-Appellees.

No. 85-2796.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1986.

Decided June 26, 1987.

As Amended Aug. 12, 1987.

Nightclub brought § 1983 suit challenging city's denial of an entertainment permit. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., granted city's motion to dismiss, and nightclub appealed. The Court of Ap-

peals, Tang, Circuit Judge, held that abstention was appropriate, considering that plaintiff failed to appeal adverse state judgments, thus satisfying requirement of ongoing state judicial proceedings, that important state interest was implicated in the proceedings, and that plaintiff had an adequate opportunity to raise its constitutional claim in state proceedings.

Affirmed.

Kennedy, Circuit Judge, concurred in the judgment with statement.

1. Federal Courts ⇐776

Decision whether to abstain under *Younger* is reviewable de novo.

2. Federal Courts ⇐813

When a case involves abstention on some ground other than *Younger*, e.g., abstention under *Railroad Commission v. Pullman Co.*, standard of review is one of abuse of discretion, with discretion to be exercised within the narrow and specific limits prescribed by the particular abstention doctrine involved.

3. Federal Courts ⇐41

Abstention from exercising of federal jurisdiction is the exception, not the rule; absent significant countervailing interests, federal courts are obliged to exercise their jurisdiction.

4. Federal Courts ⇐41

Failure to exhaust state appellate remedies satisfies requirement that there be "ongoing judicial proceedings" in order to justify federal abstention.

5. Federal Courts ⇐53

A First Amendment challenge does not alter propriety of abstention in a case in which there are ongoing state judicial proceedings. U.S.C.A. Const.Amend. 1.

6. Federal Courts ⇐65

In evaluating whether ongoing state proceedings implicate important state interests, so as to justify abstention, Court of Appeals examines nature of the proceedings; fact that noncriminal proceedings closely relate to criminal proceedings, or vindicate important state policies, or are necessary for functioning of state judicial system, demonstrates an important state interest justifying abstention.

7. Federal Courts ⇐48

Abstention was proper with respect to § 1983 suit challenging city's denial of entertainment permit for nightclub featuring live entertainment in the form of female "go-go" and "flash" dancers; plaintiff's failure to appeal adverse judgments in two related state cases satisfied requirement of ongoing state judicial proceedings; important state interest was implicated in state proceedings and plaintiff had an adequate opportunity to litigate his constitutional claim in state forum. 42 U.S.C.A. § 1983.

Michael B. Scott, Phoenix, Ariz., for plaintiffs-appellants.

W. Kent Faree, Tempe, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before KENNEDY, TANG and THOMPSON, Circuit Judges.

TANG, Circuit Judge:

Appellant World Famous Drinking Emporium, Inc. ["World Famous"] appeals from the judgment of dismissal of its claim under 42 U.S.C. § 1983, entered upon the basis of the abstention doctrine as enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

FACTS AND PROCEEDINGS:

Pursuant to a municipal zoning ordinance[1] World Famous sought an entertain-

1. The ordinance read in pertinent part:
"4. The granting of such use permits rests with the sole discretion of the Board or Commission and Council upon finding that the use covered by the permit, the manner of conducting the same, and any building which is involved will not be detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general....
In arriving at the above determination, the facts which shall be considered shall include, but not be limited to, the following:
a. Damage or nuisance arising from noise, smoke, odor, dust, vibration or illumination.
b. Hazard to persons and property from possible explosion, contamination, fire or flood.
c. Hazard occasioned by unusual volume or character of traffic.
d. Character of proposed building and site.
e. A demonstrated need of such use.
* * * * * *
6. Any use permits granted may be subject to such conditions as the Board, or Commission and Council deem applicable in order to fully carry out the provisions and intent of this Ordinance."

ment use permit from Tempe for a nightclub featuring live entertainment in the form of female "go-go" and "flash" dancers.[2]

World Famous I

The Tempe Board of Adjustment ["the Board"] held its first hearing on World Famous' application in November 1983. The Board denied the application. Upon reconsideration in January 1984, the Board denied the application a second time. World Famous then sought to overrule the Board by way of a "special action" proceeding in Maricopa County Superior Court.[3] Judge Marquardt upheld the Board.

World Famous II

World Famous' continued operation led Tempe to file criminal proceedings and a civil enforcement action. In the latter action, Tempe sought preliminary and permanent injunctive relief. World Famous opposed Tempe's request by arguing, inter alia, the unconstitutionality of the zoning ordinance. Judge LaPrade granted the preliminary injunction on September 27, 1984. World Famous complied with the terms of the injunction and ceased presenting go-go and flash dancing. Following denial by the Arizona Supreme Court of special action relief, Tempe dismissed the criminal proceeding. Judge LaPrade denied World Famous' motions to dissolve the injunction and to dismiss the case, and granted Tempe's motion for summary judgment.

World Famous III

World Famous again sought the requisite use permit without success, and filed another special action petition in Superior Court, which was dismissed by Judge Howe on August 16, 1985.

World Famous IV

World Famous filed its § 1983 action on July 17, 1985 in United States District Court for the District of Arizona. Based solely upon the abstention doctrine as enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), Judge Strand granted Tempe's motion to dismiss on September 8, 1985, stating in his memorandum:

> The issue of the constitutionality of the Tempe zoning ordinance is presently before the trial court in this case and would be subject to appellate review in the state court should an aggrieved party elect to take such action.

World Famous timely appealed.

DISCUSSION:

[1, 2] The decision whether to abstain under *Younger* is reviewable de novo. *Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 468 (9th Cir.1984). *See also Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir.1986). "When a case falls within the proscription of *Younger*, a district court must dismiss the federal action." *Id.* When a case involves absten-

2. The terms "go-go" and "flash" dancing in the instant case denote dancing by performers wearing opaque material covering the nipples and areolas of the breasts and bikini-type bottoms.

3. The scope of special action review is established by Rule 3 of the Arizona Rules of Procedure for Special Action, which reads in pertinent part:
"The only questions that may be raised in a Special Action are:
(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
(c) Whether a determination was arbitrary and capricious or an abuse of discretion."

tion on some ground other than *Younger*, *e.g.*, abstention under *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), we have stated that the standard of review is one of abuse of discretion, with the discretion to "be exercised within the narrow and specific limits prescribed by the particular abstention doctine involved." *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir.1983) (quoting *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir.1980)). *See also Fresh International Corp.* at 1356 n. 2. In the case at bench, the district court abstained on the basis of *Younger*. No other abstention principle is involved. Our review, therefore, is de novo.

[3] Abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Absent significant countervailing interests, the federal courts are obliged to exercise their jurisdiction. *Id.; County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). In *Younger v. Harris*, the Supreme Court held that federal courts should not enjoin pending state criminal proceedings except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. 401 U.S. at 46, 91 S.Ct. at 751. *Id.* Three requirements have evolved for proper invocation of *Younger*: (1) ongoing state judicial proceedings; (2) implication of an important state interest in the proceedings; and (3) an adequate opportunity to raise federal questions in the proceedings. *Goldie's*, 739 F.2d at 469 (citing *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1981)). Bad faith prosecution or harassment make abstention inappropriate even where these requirements are met. *Younger*, 401 U.S. at 47–49, 91 S.Ct. at 752–53. Similarly, satisfaction of the three requirements will not support abstention where a statute is flagrantly and patently violative of constitutional prohibitions. *Id.* at 53–54, 91 S.Ct. at 755–56.

1. Ongoing State Proceedings

[4, 5] At the time the district court abstained, World Famous had yet to appeal the adverse judgments in *World Famous II* and *World Famous III* to the state Supreme Court. Failure to exhaust state appellate remedies satisfies the requirement that there be "ongoing judicial proceedings" in order to justify federal abstention. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608–09, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975). A First Amendment challenge does not alter the propriety of abstention in such a case. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) (abstention proper where a First Amendment challenge may be raised in state court review of an administrative proceeding); *Huffman*, 420 U.S. at 612–13, 95 S.Ct. at 1212, 43 L.Ed.2d 482 (1975).

2. Important State Interest Implicated in State Proceedings

[6] *Younger* abstention is not limited to ongoing state criminal proceedings, *see, e.g., Huffman*, 420 U.S. at 609, 95 S.Ct. at 1210. It extends to certain civil proceedings provided those proceedings implicate important state interests. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, — U.S. —, 106 S.Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) (state civil rights enforcement proceedings); *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (temporary removal of child in child-abuse context); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (proceeding for recovery of fraudulently obtained welfare benefits); *Middlesex*, 423 U.S. at 432, 102 S.Ct. at 2521 (state bar discipline proceedings); *Huffman*, 420 U.S. at 605, 95 S.Ct. at 1208 (state nuisance proceeding akin to criminal prosecution). In evaluating whether the proceedings implicate important state interests, we examine the nature of the proceedings. The fact that the noncriminal proceedings closely relate to criminal proceedings, *see Huffman*, 420 U.S. at 604, 95 S.Ct. at 1208, or vindicate important state policies, *see Trainor*, 431 U.S. at 445, 97 S.Ct. at 1919, or are necessary for the

functioning of the state judicial system, *see Juidice v. Vail*, 430 U.S. 327, 336, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376 (1977), demonstrates an important state interest. *See Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520. In each of these cases, the state was a party to the proceedings. *See Miofsky v. Superior Court*, 703 F.2d 332, 337 (9th Cir.1983). *See also Worldwide Church of God, Inc. v. California*, 623 F.2d 613, 616 (9th Cir.1980) (state receivership order pursuant to investigation and regulation of fraud in charitable trusts), *cert. denied*, 449 U.S. 900, 101 S.Ct. 270, 66 L.Ed.2d 130 (1980); *Rosenthal v. Carr*, 614 F.2d 1219, 1220 (9th Cir.) (state bar disciplinary proceedings), *cert. denied* 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980).

[7] Here, Tempe brought a civil action in order to obtain compliance with an ordinance which aims at avoidance of public nuisances. It had the option of proceeding either by civil or criminal enforcement of its municipal ordinance; the option of criminal enforcement demonstrates the importance of the underlying state interest. *See Trainor*, 431 U.S. at 449–50, 97 S.Ct. at 1920–21 (Blackmun, J., concurring). Such an action, in aid of and closely related to Tempe's zoning ordinance and akin to a criminal prosecution, clearly involves an important state interest. *See Middlesex*, 457 U.S. at 434, 102 S.Ct. at 2522 (state bar disciplinary action); *Trainor*, 431 U.S. at 444, 97 S.Ct. at 1918 (civil proceeding brought to recover fraudulently obtained welfare payments); *Huffman*, 420 U.S. at 604, 95 S.Ct. at 1208 (public nuisance action). *Cf. Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 532–33 (9th Cir. 1984) (city's suit for declaratory relief not similar to criminal or "quasi-criminal" proceedings, nor did it involve interests vital to operation of state government), *rev'd on other grounds*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Goldie's*, 739 F.2d at 469 (private unlawful detainer action does not implicate state interests); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir.1983) (private tort litigation does not implicate state interests). As such, the second requirement for the proper invocation of *Younger* abstention is satisfied.

3. Adequate Opportunity to Raise Federal Question

World Famous has failed to demonstrate how review of the adverse judgments in the state courts would not have permitted an opportunity to litigate its constitutional claims. That World Famous failed to avail itself of the opportunity to litigate its constitutional claim in the state forum, does not demonstrate that the state forum did not provide an opportunity to litigate that claim. *See Juidice v. Vail*, 430 U.S. 327, 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977). World Famous had an opportunity to pursue its constitutional claim upon appeal in the state courts,[4] and failed to do so. No more is required for *Younger* abstention. *See Ohio Civil Rights Commission*, 106 S.Ct. at 2724; *Moore*, 442 U.S. at 426, 99 S.Ct. at 2379; *Juidice*, 430 U.S. at 337, 97 S.Ct. at 1218.

Further, the record reveals no harassment or bad faith on the part of Tempe in bringing the civil enforcement and criminal proceedings which would make abstention improper. *See Huffman*, 420 U.S. at 611, 95 S.Ct., at 1211.

We hold abstention was proper and the merits of the constitutionality issue are not properly before this Court. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). *See also Huffman*, 420 U.S. at 602, 95 S.Ct. at 1207 (facial invalidity of statute is not exceptional circumstance justifying federal interference with state criminal proceedings) (citing *Younger*, 401 U.S. at 53–54, 91 S.Ct. at 754–55).

We also decline to consider World Famous' estoppel argument. World Famous

4. We note that the scope of review of a special action provides for consideration of "[w]hether the defendant has proceeded ... without or in excess of jurisdiction or legal authority." Ariz. Rev.Stat.Ann., Rules of Procedure for Special Actions 3 (1973). It appears that the state courts could construe municipal ordinances in light of federal constitutional law. *Cf. Ohio Civil Rights Committee*, 106 S.Ct. at 2724.

fails to provide us with a reason for its failure to raise the estoppel issue below. Nor is the estoppel determination one of law whose proper resolution is beyond any doubt, *see Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir.1980). Accordingly, the estoppel issue is not properly before us. *See Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984); *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 665-56 (9th Cir.1984).

Affirmance makes unnecessary the consideration of Tempe's assertion that World Famous' action is precluded by the adverse determinations below.

AFFIRMED

KENNEDY, Circuit Judge, concurring:

General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and *Huffman* squarely controls. I concur in the judgment.

APPENDIX H

CORRESPONDENCE BETWEEN AMICUS CURIAE AND COUNSEL OF RECORD FOR PETITIONERS AND RESPONDENTS.

(Reference: ***Motion for Leave to File an Amicus Curiae Brief, etc.,*** **. . . Page 1, fn. 1.)**

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February 16, 2000

Simon Heller, Esq. **Transmitted by Fax (letter only)**
Center for Reproductive Laws and Policy **(212) 514-5538**
120 Wall Street, 18TH Floor
New York, New York 10005

Re: ***Amicus Curiae*** Consent Request: ***Stenberg, Nebraska Attorney General v. Carhart***, on Writ of Certiorari to the U.S. Court of Appeals for the 8TH Circuit, No. 99-830.

Dear Mr. Heller;

Pursuant to **Rule 37(3)(a)** of the **U.S. Supreme Court Rules**, request is hereby made for your consent to the filing of a brief ***Amicus Curiae*** by myself as a member of the Bar of the U.S. Supreme Court, or by my client, ***Clarence Murphy***, in support of neither party in the above cause.

Clarence Murphy contends that ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941) and the ***Watson v. Buck*** **Abstention Doctrine**, as factored into the ***Huffman*** - ***Younger*** **Abstention Doctrines** is controlling and that the Federal Court lacks **Article 3, §2** (***Ex Parte Young***, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 [1908]) subject matter jurisdiction under the **11TH Amendment** and the ***Huffman*** - ***Younger*** **Abstention Doctrines**. The Trial Court record establishes that: **(1)** the Nebraska Attorney General is not acting as a "rogue" and the ***Ex Parte Young*** fiction to that

effect is dispelled; **(2)** the State of Nebraska has not waived its **11TH Amendment** lack of subject matter jurisdiction defense; **(3)** both statutes can be constitutionally construed by the Nebraska Judiciary; **(4)** the U.S. District Court has failed to make the factual findings required by ***Huffman*** **Abstention**; therefore it does not have **Article 3, §2** (***Ex Parte Young***) subject matter jurisdiction; **(5)** the Federal Civil Rights action must be dismissed for failure to state a federal claim because Carhart has an equivalent remedy in the Nebraska State Court; and **(6)** the 8TH Circuit Court of Appeals opinion is plain error, and therefore reversible, for the reasons state by Justice O'Connor in her concurring opinion in ***Brockett v. Spokane Arcades, Inc.***, 472 U.S. 491 at 507-511, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985).

Amicus Curiae proposes the following Jurisdictional Questions based upon the High Court's duty pursuant to ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998) at **Point III**, to address the question of subject matter jurisdiction as the first order of business, and on its own motion if the parties to the lawsuit do not bring the matter to the trial court's attention:

I

Whether the U.S. District Court for the District of Nebraska Lacked **Article 3, §2** Subject Matter Jurisdiction of Respondent Carhart's Federal Civil Rights Action for Failure of the Trial Court to Make the Jurisdictional Findings of Fact Required by the **11TH Amendment** and ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941) and the ***Watson v. Buck*** **Abstention Doctrine**, as Factored into the ***Younger - Huffman*** **Abstention Doctrines** by this Court's Opinions in ***Younger v. Harris***, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971)

and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), Reh. Den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969; Where the State Legislature Has Enacted Legislation Dealing with the Public Crime of Infanticide Which Is Engaged in under the Mantra of a Personal Right to an Abortion; and Where Such Legislation Is Not Unconstitutional on its Face and Can Be Constitutionally Construed by the Nebraska Judicial System Which, Pursuant to the **Doctrine of Separation of Powers**, Is under a Constitutional Duty to Give Such Legislation a Constitutional Construction **?**

II

Whether the Opinion and Judgment of the 8TH Circuit Court of Appeals Abridges the Sovereign Right of the State of Nebraska under the **10TH** and **11TH Amendments to the Federal Constitution** to Have New Legislation Involving "Important State Interests" (Both Civil and Criminal) Given an Initial Construction by the State Judiciary Which Has the Duty under the **Doctrine of Separation of Powers** and ***Watson v. Buck***, Supra, and the ***Watson v. Buck*** **Abstention Doctrine** as That Doctrine Has Been Factored into ***Younger v. Harris***, Supra, and ***Huffman v. Pursue, Ltd.***, Supra, and the ***Younger - Huffman*** **Abstention Doctrines**, to Construe Such Statutes in a Constitutional Manner Where Possible and Assist the State Legislature in its Efforts to Write a State Statute Which Will Meet the Standards of the Federal Court and the U.S. Constitution **?**

III

Whether the Opinion and Judgment of the 8TH Circuit Court of Appeals Abridges the Sovereign Right of the State of Nebraska under the **10TH** and **11TH Amendments to the U.S. Constitution**, as Construed by this Court in ***Watson v. Buck***, Supra, and the ***Watson v. Buck*** **Abstention Doctrine** as That Doctrine Has Been Factored into ***Younger v. Harris***, Supra, and ***Huffman v. Pursue, Ltd.***, Supra, and the ***Younger - Huffman*** **Abstention Doctrines**; Which Require That New Legislation (Civil and Criminal) Involving an "Important State Interest" Which Can Be Given a Constitutional Construction must Be Initially Construed and Applied by the Nebraska Judiciary; Which; under the **Doctrine of Separation of Powers** Is Required, Where Possible, to Give the State Statute a "Saving Construction" and Thereby Assist the Nebraska State Legislature in its Effort to Write a State Statute Which Will Meet the Constitutional Requirements of the Federal Judiciary with Respect to the Federal Constitution **?**

The arguments which ***Amicus Curiae Clarence Murphy*** will make in support of the above question are those set forth in the **Application for Leave of Court to File a Petition to Intervene Pursuant to F.R.C.P. 24(a)(2), and Petition for Writ of Mandamus, Pursuant to 28 U.S.C. §1651(a) in Excess of Applicable Page Limit** (113 pages) in ***In Re Murphy***, U.S.S.C.T. Misc. No. A-612, transmitted to the U.S. Supreme Court on January 23, 1999 and filed with the U.S. Supreme Court on March 10, 1999 as ***In Re Clarence Murphy***, No. 98-1442 (30 pages) and in the ***Motion for Leave to File an***

Amicus Curiae Brief, etc. in ***Pryor, et al. v. Summit Medical Association, et al.***, No. 99-1041, filed February 2, 2000 in the U.S. Supreme Court. Copies of the above documents were served upon you as Attorney of Record in ***Pryor, et al. v. Summit Medical Association, et al.***, supra.

Sincerely yours;
James J. Clancy
Attorney for Clarence Murphy.

JJC/cjc

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February 17, 2000

Hon. Donald Stenberg
Nebraska Attorney General
2115 State Capitol
Lincoln, Nebraska 68509

Transmitted by Fax (letter only)
(402) 471-3297

Re: ***Amicus Curiae*** Consent Request: ***Stenberg, Nebraska Attorney General v. Carhart***, on Writ of Certiorari to the U.S. Court of Appeals for the 8TH Circuit, No. 99-830.

Dear Mr. Stenberg;

Pursuant to **Rule 37(3)(a)** of the **U.S. Supreme Court Rules**, request is hereby made for your consent to the filing of a brief ***Amicus Curiae*** by myself as a member of the Bar of the U.S. Supreme Court, or by my client, ***Clarence Murphy***, in support of neither party in the above cause.

Clarence Murphy contends that ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941) and the ***Watson v. Buck*** **Abstention Doctrine**, as factored into the ***Huffman*** - ***Younger*** **Abstention Doctrines** is controlling and that the Federal Court lacks **Article 3, §2** (***Ex Parte Young***, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 [1908]) subject matter jurisdiction under the **11TH Amendment** and the ***Huffman*** - ***Younger*** **Abstention Doctrines**. The Trial Court record establishes that: **(1)** the Nebraska Attorney General is not acting as a "rogue" and the ***Ex Parte Young*** fiction to that effect is dispelled; **(2)** the State of Nebraska has not waived its

11TH Amendment lack of subject matter jurisdiction defense; **(3)** both statutes can be constitutionally construed by the Nebraska Judiciary; **(4)** the U.S. District Court has failed to make the factual findings required by ***Huffman*** **Abstention**; therefore it does not have **Article 3, §2** (***Ex Parte Young***) subject matter jurisdiction; **(5)** the Federal Civil Rights action must be dismissed for failure to state a federal claim because Carhart has an equivalent remedy in the Nebraska State Court; and **(6)** the 8TH Circuit Court of Appeals opinion is plain error, and therefore reversible, for the reasons state by Justice O'Connor in her concurring opinion in ***Brockett v. Spokane Arcades, Inc.***, 472 U.S. 491 at 507-511, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985).

Amicus Curiae proposes the following Jurisdictional Questions based upon the High Court's duty pursuant to ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998) at **Point III**, to address the question of subject matter jurisdiction as the first order of business, and on its own motion if the parties to the lawsuit do not bring the matter to the trial court's attention:

I

Whether the U.S. District Court for the District of Nebraska Lacked **Article 3, §2** Subject Matter Jurisdiction of Respondent Carhart's Federal Civil Rights Action for Failure of the Trial Court to Make the Jurisdictional Findings of Fact Required by the **11TH Amendment** and ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941) and the ***Watson v. Buck*** **Abstention Doctrine**, as Factored into the ***Younger - Huffman*** **Abstention Doctrines** by this Court's Opinions in ***Younger v. Harris***, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 43

L.Ed.2d 482, 95 S.Ct. 1200 (1975), Reh. Den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969; Where the State Legislature Has Enacted Legislation Dealing with the Public Crime of Infanticide Which Is Engaged in under the Mantra of a Personal Right to an Abortion; and Where Such Legislation Is Not Unconstitutional on its Face and Can Be Constitutionally Construed by the Nebraska Judicial System Which, Pursuant to the **Doctrine of Separation of Powers**, Is under a Constitutional Duty to Give Such Legislation a Constitutional Construction **?**

II

Whether the Opinion and Judgment of the 8TH Circuit Court of Appeals Abridges the Sovereign Right of the State of Nebraska under the **10TH** and **11TH Amendments to the Federal Constitution** to Have New Legislation Involving "Important State Interests" (Both Civil and Criminal) Given an Initial Construction by the State Judiciary Which Has the Duty under the **Doctrine of Separation of Powers** and ***Watson v. Buck***, Supra, and the ***Watson v. Buck*** **Abstention Doctrine** as That Doctrine Has Been Factored into ***Younger v. Harris***, Supra, and ***Huffman v. Pursue, Ltd.***, Supra, and the ***Younger - Huffman*** **Abstention Doctrines**, to Construe Such Statutes in a Constitutional Manner Where Possible and Assist the State Legislature in its Efforts to Write a State Statute Which Will Meet the Standards of the Federal Court and the U.S. Constitution **?**

III

Whether the Opinion and Judgment of the 8TH Circuit Court of Appeals Abridges the Sovereign Right of the State of Nebraska under the **10TH** and **11TH Amendments to the U.S. Constitution**, as Construed by this Court in ***Watson v. Buck***, Supra, and the ***Watson v. Buck*** **Abstention Doctrine** as That Doctrine Has Been Factored into ***Younger v. Harris***, Supra, and ***Huffman v. Pursue, Ltd.***, Supra, and the ***Younger - Huffman*** **Abstention Doctrines**; Which Require That New Legislation (Civil and Criminal) Involving an "Important State Interest" Which Can Be Given a Constitutional Construction must Be Initially Construed and Applied by the Nebraska Judiciary; Which; under the **Doctrine of Separation of Powers** Is Required, Where Possible, to Give the State Statute a "Saving Construction" and Thereby Assist the Nebraska State Legislature in its Effort to Write a State Statute Which Will Meet the Constitutional Requirements of the Federal Judiciary with Respect to the Federal Constitution ?

The arguments which ***Amicus Curiae Clarence Murphy*** will make in support of the above question are those set forth in the **Application for Leave of Court to File a Petition to Intervene Pursuant to F.R.C.P. 24(a)(2), and Petition for Writ of Mandamus, Pursuant to 28 U.S.C. §1651(a) in Excess of Applicable Page Limit** (113 pages) in ***In Re Murphy***, U.S.S.C.T. Misc. No. A-612, transmitted to the U.S. Supreme Court on January 23, 1999 and filed with the U.S. Supreme Court on March 10, 1999 as ***In Re Clarence Murphy***, No. 98-1442 (30 pages) and in the ***Motion for Leave to File an Amicus Curiae Brief, etc.*** in ***Pryor, et al. v. Summit Medical Association, et al.***, No. 99-1041, filed February 2, 2000 in the

U.S. Supreme Court (a copy of the ***Motion*** is being sent to you under separate cover by Priority Mail on this date [2/17/99]).

Sincerely yours;
James J. Clancy
Attorney for Clarence Murphy.

JJC/cjc

Encls.: (Sent under separate cover, by Priority Mail): ***Motion for Leave to File an Amicus Curiae Brief, etc.*** in ***Pryor, et al. v. Summit Medical Association, et al.***, U.S.S.C.T. No. 99-1041.

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February 17, 2000

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James J. Clancy
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Re: *Stenberg v. Carhart*, No. 99-830
Amicus Curiae Consent Request

Dear Mr. Clancy:

I received your request for consent in the above referenced matter. Respondent does not consent to the filing of an *Amicus Curiae* brief by you or your client, Clarence Murphy.

Please do not request consent again.

Sincerely,

Simon Heller

Simon Heller

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February 18, 2000

James J. Clancy
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La Tuna Canyon, Ca 91352

Re: ***Stenberg v. Carhart***, No. 99-830

Dear Mr. Clancy:

Thank you for your interest in supporting the position of the State of Nebraska in the above-referenced case. Pursuant to our agreement with opposing counsel regarding mutual consent to a limited number of amicus briefs, we are not able to provide consent to your brief. We encourage you to file your brief along with the requisite motion for leave.

Sincerely,

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Attorney General

Steve Grasz
Deputy Attorney General

3-931-21

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